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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 743

JAMES F. McKAY, et al.,
Petitioners,

vs.

RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION #1067, et al., and HOWARD AUTOMOBILE COMPANY, a corporation,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California
and
Brief in Support Thereof.

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January 30, 1941.

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Subject Index

	Page
PETITION FOR WRIT OF CERTIORARI	1
Summary statement of matter involved	2
Proceedings below	4
Opinions below	5
Basis of Supreme Court's jurisdiction	5
Raising of Federal Question	7
Questions presented	9
Reasons for allowance of writ	11
Substantial character of questions	14
Conclusion	14
BRIEF IN SUPPORT OF PETITION	25
Specification of errors	25
Summary of Argument	26
Argument	29
I(A). The decision of the Court below deprives petitioners of their right to self-organize without employer interference in violation of Wagner Act and Due Process Clause of XIV Amendment	29
Employees' right to freely self-organize is fundamental	29
Employees' right to freely self-organize is recognized by:	
Railway Labor Act	32
Norris-La Guardia Law	32
Wagner Act	33
California Labor Code	33
Employees' right freely to self-organize a property right	36

Page

I (B). The Norris-La Guardia Law guarantees the employees' right of free self-organization 32

I(C). State may not deprive employee of right freely to self organize without due process of law 37

Decision of court below does deprive petitioners of that right (Point (f)) 38

II(A). Petitioners adequately invoked right 39

II(B). The automobile business is an interstate business 43

III. Employees have the right though employer not in interstate commerce 43

IV. Certification by Labor Board unnecessary to assertion of right 45

V. Employees representing only a part of the employees or crafts employed in a plant have the right 49

VI. Employees have the right though they have no outside affiliation 51

VII. Employees have the right though their organization has no constitution, by-laws, pledges or rules 53

VIII. A state may not erect a burden of proof or pleading against employees exercising the right 54

IX. State court's decision purporting to find and recite material facts, unsupported by record, is a deprival of liberty and property without due process 58

X. Attempt of state court to privilege employer coercion of employees in concert with an outside labor organization, while withholding the privilege from all other labor organizations denies them equal protection 59

Pages

CONCLUSION 64

APPENDIX 15

Statutory provisions involved 15

Norris-La Guardia Law, Sections 2, 3 ..... 15, 16

Wagner Act, Sections 1, 2, 7, 8(1) 17, 18, 21

Cal. Labor Code, Sections 920, 921, 922, 923, 1110 ..... 22, 24

Table of Authorities Cited

Pages

CASES

Abbey Co. v. S. Mateo County, 167 Cal. 434 41
Ackerman v. Scheutzverein, 60 S. W. (Tex.) 366 54
Amalg. Workers v. Edison Co., 309 U. S. 261 ..... 11, 31
Amer. Foundries v. Tri-City Council, 257 U. S. 184 30
Am. Furniture Co. v. B. of Teamsters, 222 Wis. 338, 268 N. W. 250 38
Appalachian Power Co. v. Labor Board, 93 Fed. (2) 985 56
Assoc. Press v. Labor Board, 305 U. S. 103 33

Ballston Co. v. Labor Board, 98 Fed. (2) 758 ..... 48, 50, 52, 53
Bank v. Anderson, 269 U. S. 341 ..... 12, 41
Brinkerhof Trust Co. v. Hill, 281 U. S. 673 43

Carter v. Texas, 177 U. S. 442 ..... 11, 41
Cissna v. Tennessee, 246 U. S. 289 ..... 12, 40
Coppage v. Kansas, 136 U. S. 1, 14-15 ..... 29, 37, 61

Donnelly v. Garment Workers Union, 21 Fed. Supp. 807 52
Donnelly Co. v. Garment Workers Union, 99 Fed. (2) 309 ..... 50, 52

Ebbinghousen v. Worth Club, 4 Abb. N. C. 300 54
Edison Co. v. Labor Board, 305 U. S. 197 ..... 13, 44, 46, 48, 49, 54
Erie R. Co. v. Purdy, 185 U. S. 148 ..... 11, 41

Grand Trunk v. Lindsay, 233 U. S. 42 40
Green Bay Canal Co. v. Patten Co., 172 U. S. 58 ..... 12, 40

Internat. Assn. v. Labor Board, 61 S. Ct. 83 ..... 52, 60, 62

Koepple v. Morrison, 84 Cal. App. 137 41

Labor Board v. Abell Co., 97 Fed. (2) 951 55
Labor Board v. Bell Oil Co., 98 Fed. (2) 870 ..... 55, 58
Labor Board v. Bradford Assn., 310 U. S. 318 44
Labor Board v. Columbian Co., 306 U. S. 292 ..... 48, 54, 58
Labor Board v. Del. Ferry Co., 90 Fed. (2) 520 49
Labor Board v. Fainblatt, 306 U. S. 601, 604, 608 ..... 13, 44
Labor Board v. Falk Corporation, 102 Fed. (2) 383 13
Labor Board v. Fansteel M. Corp., 306 U. S. 240 ..... 33, 52
Labor Board v. Griswold Co., 106 Fed. (2) 713 ..... 11, 49, 50

Pages

Labor Board v. Hopwood Co., 98 Fed. (2) 97 ..... 50, 52
Labor Board v. Jones & Laughlin, 301 U. S. 1 ..... 8, 11, 13, 30, 44
Labor Board v. Link-Belt Co., 61 Sup. Ct. 358 ..... 13, 51, 57
Labor Board v. Lion Shoe Co., 97 Fed. (2) 448 52
Labor Board v. Piqua Co., 109 Fed. (2) 552 ..... 12, 48, 50
Labor Board v. Remington Rand, 94 Fed. (2) 862 49
Labor Board v. Sterling Motors Co., 109 Fed. (2) 194 ..... 34, 47, 48, 50, 51, 53, 55
Labor Board v. Waterman SS. Corp., 309 U. S. 206 13

M. K. & T. Co. v. Wulf, 226 U. S. 570 40
Madigan v. Hale Co., 90 Cal. App. 151 41
McCabe v. Santa Fe Ry. Co., 235 U. S. 151 ..... 13, 62
McCulloch v. Maryland, 4 Wheat. 316 56
McKay v. Auto Salesmens Union, 89 Pac. (2) 426 5
McKay v. Auto Salesmens Union, 90 Pac. (2) 113 5
McKay v. Auto Salesmens Union, 100 Cal. Dec. 347, 106 Pac. (2) 403 5
McLaughlin v. Wall, 105 Pac. (Kan.) 33 54
Metropolitan Market v. Lyons, 100 Cal. Dec. 397, 106 Pac. (2) 414 5
Midland Co. v. Rudneck, 188 U. S. 265 41
Moore v. Moore, 47 N. Y. 467 57
Moore v. Pleasant Constr. Co. (Ariz. 1937) 72 Pac. (2) 573 43
Morrison v. California, 291 U. S. 82 56

Nixon v. Condon, 286 U. S. 73 ..... 13, 62
N. Ca. Ry. Co. v. Storey, 268 U. S. 291 5
North Dakota v. Hanson, 215 U. S. 515 56

People v. Assoc. Oil Co., 211 Cal. 93 41
People v. Crowl, 28 Cal. App. (2) 299 41
People v. Gates, 43 N. Y. 40 57
People v. Tilken, 34 Cal. App. (2) 743 56

Schaefer v. Pharmacists Union, 100 Cal. Dec. 391, 106 Pac. (2) 403 5
Seaboard Air Line v. Duvall, 225 U. S. 477 40
Sinnott v. Davenport, 22 How. 227 56
So. Cal. Co. v. Alberti, 58 Cal. App. 84 41

Pages

T. & N. O. Ry. v. Ry. Clks., 281 U. S. 548 ..... 11, 12, 30, 32, 36, 37, 45

U. S. v. Williams, 175 Fed. 274 58
U. S. v. Williams, 189 Fed. 915 58
U. S. v. Williams, 200 Fed. 538, 541 58

Western R.R. v. Henderson, 279 U. S. 639 56
Wong Tsich Wye v. Nagle, 33 Fed. (2) 226 58
Virginian Ry. Co. v. Federation, 84 F. (2) 641 ..... 11, 36
Yamataya v. Fisher, 189 U. S. 86 58
Yick Wo v. Hopkins, 118 U. S. 356 63

STATUTES REFERRED TO

United States Statutes—
Fourteenth Amendment 29
Norris-La Guardia Law (47 Stats. 70)
Section 2 ..... 9, 26, 32, 51
Section 4 26
Railway Labor Act (44 Stats. 577) 32
Wagner Act (49 Stat. 449)
Section 1 ..... 13, 26, 27, 33, 44
Section 2 ..... 13, 27, 44, 45
Section 7 ..... 9, 11, 26, 27, 33
Section 8 ..... 9, 11, 26, 33, 64
18 U. S. C. A. Section 51 38
28 U. S. C. A. Section 344 14
36 Stats. 1156, Secs. 236, 237 14
R. S. Sec. 709 14

California Statutes—
Cal. Code of Civil Procedure
Section 405 7
Section 452 ..... 8, 56
Section 1875 42
Section 1963 (1) 56
Section 1963 (19) 56

Pages

California Labor Code

Section 920 33
Section 921 ..... 10, 13, 29, 33, 38, 59, 62, 64
Section 922 ..... 33, 64
Section 923 ..... 32, 33, 38, 61, 62, 64

Clayton Act, Section 20 36

OTHER AUTHORITIES

2 *Calif. Jur.* Sec. 405, n. 12 7
2 *Calif. Jur.* Sec. 419, n. 14 7
Census of Manufacturers (Dept. of Commerce) 1937 42
Report of U. S. Commissioner of Internal Revenue (1938) 42

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No.....

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RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION #1067, et al., and HOWARD AUTOMOBILE COMPANY, a corporation,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable the Supreme Court of the United States:

Petitioners, all of the plaintiffs named as such in the complaint (R. 1), respectfully pray that a writ of certiorari issue to review the decision herein of the Supreme Court of California (the Court of last resort in that State) filed October 14, 1940, and which became final November 14, 1940.

A. SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioners as plaintiffs sued to enjoin defendant Retail Automobile Salesmen's Union, and those acting in concert with it, from picketing the business of petitioners' employer, the Howard Automobile Company, and advertising it as unfair to labor. (R. 1-7)

The complaint alleged:

Petitioners are all the salesmen of the Howard Company, a corporation engaged in the auto selling and repairing business in San Francisco and elsewhere, and are all satisfied, and the company is satisfied, with their terms, pay, hours and working conditions, and want to continue therein, and the company is satisfied with their work and wants to continue their employment. (R. 2)

In May, 1937, petitioners united and organized and designated three of themselves a committee to negotiate with the company regarding pay, wages, hours and working conditions, in accordance with the Wagner Act, and notified the company and the Regional Director of the Labor Board of their choice of bargaining representative, and the company recognized the committee as such for all the sales force. (R. 4) No labor dispute or controversy over terms or conditions of work or association or representation in negotiating terms or conditions of work existed between petitioners and the company. (R. 4, 5)

None of the petitioners had or has any dispute with the company over wages, hours or working conditions, or otherwise. (R. 5) None was or is on strike.

(R. 5) There was and is no discussion or negotiations concerning terms, hours, wages, or working conditions. (R. 5) No petitioner is a member of any defendant union or wants or intends to become such. (R. 5) No petitioner has any agreement with defendant unions or other labor organization, nor has requested any of the unions to act for him as his bargaining agency. (R. 5)

Defendant unions have rules and by-laws enforceable by fines and penalties forbidding their members to cross picket lines or do business with firms under picket, and the company employs members of defendant unions. (R. 5) Pursuant to such rules, picketing the plant compels all the members of each union not to visit, deliver to, or receive goods from, do business with, or work for the company. (R. 5)

The Salesmen's Union asked petitioners to join and petitioners refused, and in consequence the union picketed and will remain on picket until the company makes petitioners join the union or discharges them. (R. 5-6)

The picket closed down the plant, stopped all work, destroyed its business, and the company will, unless the union is restrained, discharge all petitioners or require them to join the union. (R. 6) None of the pickets were employees of the company. (R. 6) The San Francisco Labor Council "okehed" the picket, put the company on its "We don't patronize list" and appointed a Board of Strategy to exert pressure and coercion on the company and petitioners, respectively,

to sign a closed shop contract and join the union. (R. 6)

On return of the preliminary restraining order, (R. 8-10), defendants elected to show cause on matter of law alone, and filed a demurrer (R. 10-12) and motion to strike. (R. 12-13) The Superior Court sustained the demurrer and dissolved the restraining order and denied a temporary injunction, two distinct orders under California practice. (R. 14, Opinion, R. 14-22) Petitioners appealed from the order denying a temporary injunction. (R. 23)

The case was transferred to the District Court of Appeal. (R. 24) That Court reversed the judgment (Opinion and Judgment, R. 102-117) and denied a rehearing (Opinion and Judgment, R. 117-122).

The Supreme Court granted a hearing before the Supreme Court after decision of the District Court of Appeal, and transferred the case to itself. (Order R. 25) The Supreme Court affirmed the judgment of the Superior Court October 14, 1940 (3 judges dissenting), (Opinion and Order, R. 25) and denied a rehearing November 9, 1940, (3 judges dissenting). (Opinion and Order, R. 101) The remittitur went down November 14, 1940 (Original Tr. p. 100), and the judgment became final on that day.[1] The decision of the Supreme Court of California is the law of the case, and lays down a rule conclusive on us and

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[1]Rule XXX of California Supreme Court, Sec. 1:

"Unless otherwise specially ordered, or a rehearing be granted, judgments of the Supreme Court in bank become final at the end of the thirtieth day after the date of pronouncement."

on the Courts of California on any application for a final injunction. It came at a time when all opportunity to add to or correct the record had long since passed. (R. 14) It left nothing for the Courts to do but dismiss petitioners' case. (*N. Ca. R. Co. v. Story*, 268 U. S. 291 and cases cited)

B. OPINIONS BELOW.

The opinion of the Superior Court (R. 14-22) is unreported.

The opinions of the District Court of Appeal (R. 102-122) are reported in 89 Pac. (2) 426, 90 Pac. (2) 113, and are not yet reported officially.

The opinion of the Supreme Court (R. 25-79) is reported in 100 Cal. Dec. 347, 106 Pacific (2) 373, and is not yet reported officially.

The opinion of the Supreme Court in the companion cases of *Schaefer v. Pharmacists Union* (R. 79) and *Metropolitan Market v. Lyons* (R. 88) are reported in 100 Cal. Dec. 391, and 397, and in 106 Pac. (2) 403 and 414. They are not yet officially reported.

C. BASIS OF SUPREME COURT'S JURISDICTION.

In their complaint petitioners alleged that their employer was engaged in the automobile selling and repairing business in San Francisco and elsewhere (R. 2) and that petitioners, all its salesmen, united and organized, and designated three of their number a committee to negotiate rates of pay, wages, hours

of labor and other conditions of employment with the company, in accordance with the terms of the Wagner Labor Relations Act, and forthwith notified the company and the Regional Director of the National Labor Relations Board of their choice of a bargaining representative. (R. 4) The company then and there recognized the committee as bargaining agents for the entire sales force, all the petitioners. (R. 4)

The Superior Court disposed of this claim by saying it was not alleged that the company is engaged in interstate commerce so as to bring it within the jurisdiction of that statute. (R. 21)

The Supreme Court of California in affirming the Superior Court's judgment disposed of the point thus: The allegations concerning the National Labor Relations Act need not be considered because

1. It is not alleged that the Labor Board has certified petitioners' organization as a bargaining agent. (R. 40)

2. It is not alleged the company is engaged in interstate commerce. (R. 40)

3. The allegation that the petitioners formed a labor organization "in accordance with the Wagner Labor Relations Act" is a legal conclusion. (R. 40)

4. Petitioners did not show their organization was a freely organized and independent trade union, because

a. Petitioners are only a portion of the employees of a single plant. (R. 40)

b. They have no affiliation with any outside labor organization. (R. 40)

c. They have no constitution, by-laws, pledges or rules. (R. 40)

d. There is apparent unity of interest between petitioners and the employer which negatives the inference that they have a bona fide independent bargaining organization. (R. 40)

Paragraphs 4a to 4d above were surprise rulings based on no evidence at all nor on anything in the record.

D. THE RAISING OF THE FEDERAL QUESTION.

The question was raised in the complaint (R. 2, 4) the first step in the action. (Cal. Code Civil Procedure Sec. 405) The Superior Court ignored it. (R. 21) We appealed.

In California, there is no assignment of errors.

> 2 *Calif. Jurisp.* "Appeal and Error", Section 405, note 12 and cases cited.

Errors are assigned in the appellant's opening brief on appeal.

> 2 *Calif. Jurisp.* "Appeal and Error", Section 419, note 14 and cases cited.

Petitioners so assigned the point in their opening brief.

> "V. Plaintiffs have a vindicable right to self-organization under Federal Statute" (Opening

Brief p. 37) citing *T. & N. O. v. Ry. Clks.,* 281 U.S. 548, 571, further making the point that the picket here was a conspiracy to punish and oppress petitioners for its exercise under 18 U.S. C.A. Section 51.

"VI. Federal Law forbids justification of defendant's action." (Opening Brief p. 40) citing Section 7 of the Wagner Act.

"VII. The automobile business is interstate in character." (Opening Brief p. 43)

Thirty briefs were filed by the parties and the friends of the Court. The cases were argued four times, once in the Court of Appeal and three times in the Supreme Court.

All constitutional considerations were urged as the opinions show. (R. 16-17, 18; 33, 38-9, 40, 43-44, 60, 61-2, 64-5, 68, 70, 71, 72, 73, 105, 106, 107, 112, 113, 118, 119, 120, 121, et seq.)

Finally, in their petition for a rehearing petitioners again urged the point "Freedom of workers to organize is a constitutional right," (citing *Labor Board v. Jones & Laughlin,* 301 U.S. 1) "part of the liberty guaranteed by the XIV Amendment."

Many of the rulings of the Court were shockingly novel, as the dissenters pointed out, were not suggested by either lower Court, ignored settled rules of pleading in California, (e. g. Cal. Code Civ. Proc. 452) came unexpectedly at the end of the proceeding, when petitioners had no right to add to the record,

and supplied a new and unexpected basis for petitioners' claim of denial of Federal rights.

E. QUESTIONS PRESENTED.

1(a). Does not the decision of the California Supreme Court deny to petitioners the fundamental right to self-organize free from employer interference, guaranteed by Sections 7 and 8 of the Wagner Act?

1(b). Is not this right guaranteed by Section 2 of the Norris-La Guardia Law (47 Stats. 70) by necessary implication?

1.(c). Is not this right part of the liberty and property of which the state cannot deprive a person without due process of law under the XIV Amendment?

2. Is the allegation that petitioners "united and organized in accordance with the Wagner Labor Relations Act" a mere legal conclusion?

3. Must the employer be shown to be engaged in interstate commerce before the employee can assert or exercise the right to self-organize without employer interference?

4. Does the right of petitioners to self-organize depend on the Labor Board's certification of petitioners' organization as the proper bargaining unit?

5. Must the self-organizing employees embrace all the workers in a plant before they can assert the right to self-organize?

6. Must the petitioners have affiliation with an outside labor organization before they can assert the right?

7. Must the petitioners show they have a constitution, by-laws, pledges or rules before they can assert the right?

8. Must petitioners "negative" all "unity of interest" between themselves and their employers to assert the right?

9. Does not the act of the Supreme Court of California in purporting to find and recite, on no evidence at all, that petitioners have no constitution, by-laws, pledges, or rules, and that there is an apparent unity of interest between petitioners and their employers, deprive petitioners of liberty and property without due process of law?

10. Does not the decision of the Supreme Court of California, by construction of the unambiguous Section 921 of the California Labor Code, (Appendix) to authorize a labor organization with outside affiliations to coerce petitioners' employer into coercing petitioners to join defendants' organization, while denying to petitioners' organization the same right, deny to petitioners the equal protection of the law under the XIV Amendment?

F. REASONS FOR ALLOWANCE OF WRIT.

The right of self-organization guaranteed by the Wagner Act (Section 7 and Sec. 8, subd. (1)) is a fundamental right.

T. & N. O. v. Ry. Clks., 281 U.S. 548, 568;
Labor Board v. Jones & Laughlin, 301 U.S. 1, 33;
Amalg. Workers v. Edison Co., 309 U.S. 261, 263-4.

According to the last opinion the right is fundamental and is not *given* (though expressly *guaranteed,* Sec. 7, 8 (1)) by the Wagner Act or any other act. If this is true it is a constitutional right. To deprive petitioners of that right is to deprive them of liberty and property without due process of law.

Being claimed under the Wagner Act, it is being claimed under the constitution.

The right to self-organize has been held to be a property right.

T. & N. O. v. Ry. Clks., 281 U.S. 548, 571;
Virginian Ry. Co. v. Federation (CCA-4 1936), 84 F. (2) 641, 644;
Labor Board v. Griswold Co., (CCA-3 1939), 106 Fed. (2) 713, 720.

Adequate assertion of the right is itself a Federal question, not concluded by the State Court's holding.

Carter v. Texas. 177 U.S. 442;
Erie R. Co. v. Purdy, 185 U.S. 148;

Bank v. Anderson, 269 U.S. 341 (State court's ruling on sufficiency of pleading under state law not conclusive).

The specification of right here was sufficient.

Green Bay Canal Co. v. Patten Paper Co., 172 U.S. 58 (allegation in cross-complaint that cross-plaintiff claimed his rights under named Federal Statutes);

Cissna v. Tennessee, 246 U.S. 289.

Basing a decision upon statements and recitals of fact in the opinion of the state's highest Court, with no evidence or facts to support them, is itself a denial of liberty and property without due process of law under the due process clause of the XIV Amendment.

Certification by the Labor Board is not necessary to the existence or assertion of the right.

T. & N. O. v. Ry. Clks., 281 U.S. 548, esp. 557.

The Labor Board has no jurisdiction until the employer violates the right and a complaint therefor has been filed.

Labor Board v. Piqua Co. (CCA-6 1940), 109 Fed. (2) 552, 556.

Here the employer accepted petitioners' organization as an appropriate bargaining unit. (R. 4)

These reasons will be developed in petitioners' brief filed herewith.

The Wagner Act applies not only to Interstat

Commerce but to any business affecting or affected by it.

The Wagner Act (49 Stats. 449, Section 1, Par. 1, Subpar. (c); Section 2, subd. 7);
Labor Board v. Jones & Laughlin, 301 U.S. 1, 34-49;
Labor Board v. Fainblatt, 306 U.S. 601, 604, 608;
Edison Co. v. Labor Board, 305 U.S. 197, 222;
Labor Board v. Falk Corp. (CCA-7 1939), 102 F. (2) 383, 389.

The decision of the state Supreme Court construed Section 921, subdivision (a) of the Labor Code of California (Cal. Stats. 1937 Ch. 90, see Appendix) not to apply to labor organization with outside affiliations, and thus allowed such a labor organization to coerce the employer to coerce the petitioners, while denying to petitioners and similar organizations the same right (R. 55, 83-89), thus denying petitioners the equal protection of the laws.

McCabe v. Santa Fe Ry. Co., 235 U.S. 151;
Nixon v. Condon, 286 U.S. 73.

This was a surprise ruling also.

These are all questions calling for speedy settlement in the interest of correct interpretation of the Wagner Act. They are "important in an orderly administration of the Act".

Labor Board v. Link-Belt Co., 61 Sup. Ct. 358, 360;
Labor Board v. Waterman SS. Corp., 309 U.S. 206.

The decision of the Supreme Court of California was the final judgment of the highest Court of the state of California in which a decision could be had where has been drawn in question petitioners' right title, privilege and immunity specially set up and claimed by petitoners under the constitution and a statute of the United States within Title 28 U.S.C.A. 344 (b), 36 Stats. 1156, Sections 236, 237, R. S. Section 709 as amended.

G. THE SUBSTANTIAL CHARACTER OF THE QUESTIONS.

The nature of the case stated above, and the reasons urged for the granting of the writ in the brief hereto appended demonstrates the substantial character of the questions involved.

CONCLUSION.

It is respectfully submitted that petitioners' Petition for a Writ of Certiorari should be granted to review the ruling of the Supreme Court of California.

Dated: January 30, 1941.

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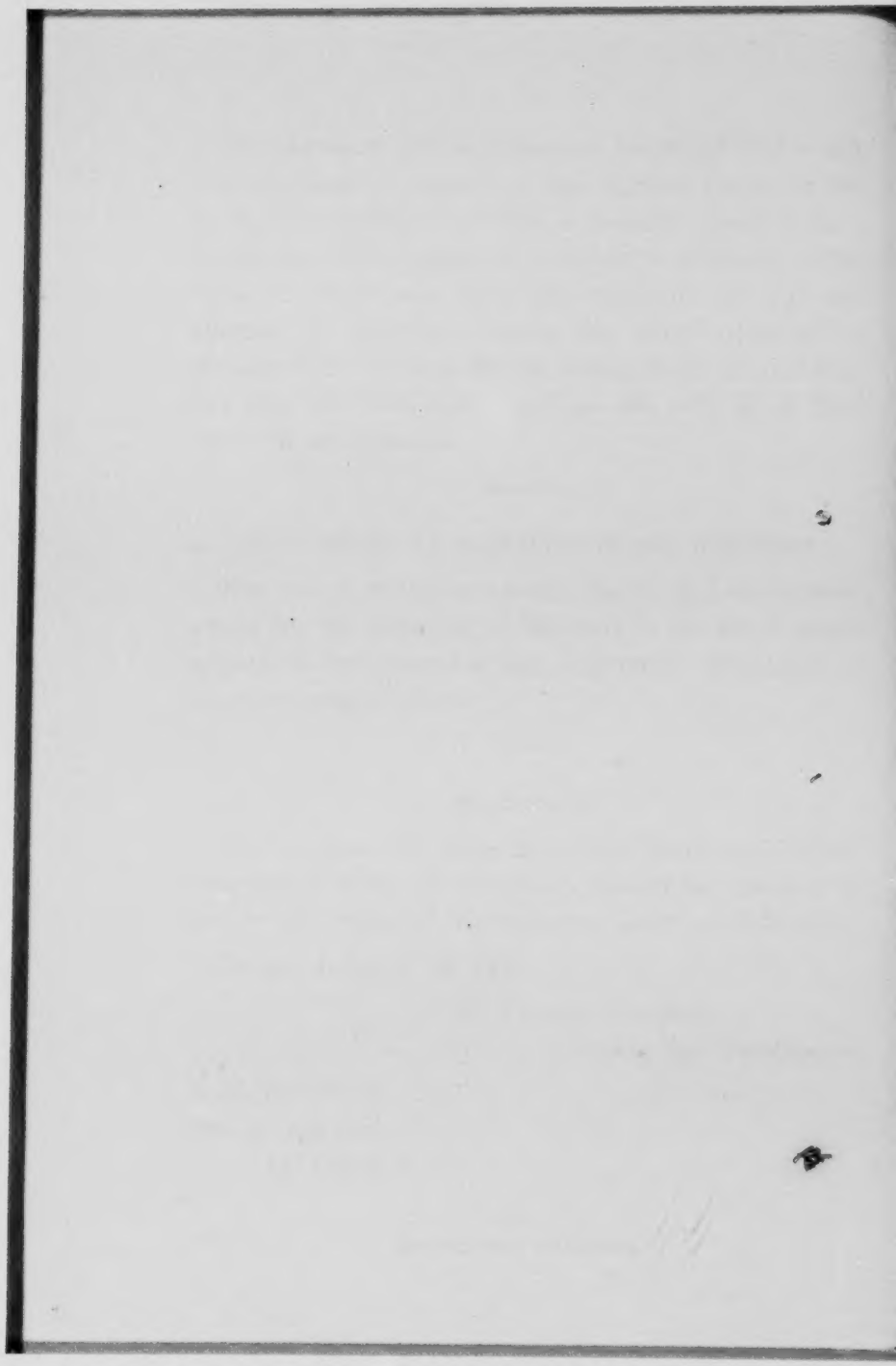
(APPENDIX FOLLOWS.)



Appendix

STATUTORY PROVISIONS INVOLVED (UNITED STATES).

The Norris La Guardia Law, 47 Stats. 70, Sec. 2 (Title 29 U.S.C.A. 102):

102. Public Policy in labor matters declared.

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective

bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

The Norris La Guardia Law, 47 Stats. 70, Sec. 3 (Title 29 U.S.C.A. 103):

103. Nonenforceability of undertakings in conflict with public policy; "yellow dog" contracts. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in Section 102 of this chapter, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from

an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

National Labor Relations Act (Wagner Act), 49 Stats. 449, Sec. 1, (Title 29 U.S.C.A. Sec. 151):

151. Findings and declaration of policy.

The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage

rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

National Labor Relations Act (Wagner Act), 49 Stats. 450, Sec. 2 (Title 29 U.S.C.A. Sec. 152):

152. Definitions.

When used in Sections 151 to 166 of this title—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to Sections 151 to 163 of Title 45, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the chapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees

participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in Section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by Section 153 of this title.

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Section 702a of Title 15 approved June 19, 1934, (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Chapter 15 of Title 15 as amended and continued by Sections 702 and 705a of Title 15.

National Labor Relations Act (Wagner Act), 49 Stats. 452, Sec. 7 (Title 29 U.S.C.A. Sec. 157):

157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

National Labor Relations Act (Wagner Act), 49 Stats. 452, Sec. 8(1) (Title 29 U.S.C.A. Sec. 158(1)):

158. Unfair labor practices by employer defined.

It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

STATUTORY PROVISIONS INVOLVED (CALIFORNIA).

Labor Code of California (Cal. Stats. 1937—Chapter 90):

PART 3. PRIVILEGES AND IMMUNITIES.

Chapter 1. Contracts Against Public Policy.

920. As used in this chapter, unless the context otherwise indicates, "promise" includes promise, undertaking, contract, or agreement, whether written or oral, express or implied.

921. Every promise made after August 21, 1933, between any employee or prospective employee and his employer, prospective employer or any other person is contrary to public policy if either party thereto promises any of the following:

(a) To join or to remain a member of a labor organization or to join or remain a member of an employer organization,

(b) Not to join or not to remain a member of a labor organization or of an employer organization,

(c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization.

Such promise shall not afford any basis for the granting of legal or equitable relief by any court

against a party to such promise, or against any other persons who advise, urge, or induce, without fraud or violence or threat thereof, either party thereto to act in disregard of such promise.

922. Any person or agent or officer thereof who coerces or compels any person to enter into an agreement, written or verbal, not to join or become a member of any labor organization, as a condition of securing employment or continuing in the employment of any such person is guilty of a misdemeanor.

923. In the interpretation and application of this chapter, the public policy of this State is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization, or in other con-

certed activities for the purpose of collective bargaining or other mutual aid or protection.

Chapter 6. Agreements In Connection With Trade Disputes.

1110. No agreement, combination, or contract, by or between two or more persons to do or procure to be done, or not to do or procure not to be done, any act in contemplation or furtherance of any trade dispute between employers and employees in the State is criminal, if the same act committed by one person would not be punishable as a crime. This chapter does not authorize violence, or threats thereof.

In the Supreme Court of the United States

OCTOBER TERM, 1940

No.....

JAMES F. McKAY, et al.,
Petitioners,

vs.

RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION #1067, et al., and HOWARD AUTOMOBILE COMPANY, a corporation,
Respondents.

Brief in Support of Petition for Writ of Certiorari

A statement of the case has been given in the Petition (pp. 2-5) and to avoid duplication is not repeated.

References to the opinions below are supplied in the Petition. (p. 5)

SPECIFICATION OF ERRORS.

The decision of the California Supreme Court was erroneous in respect of each of the questions specified

under the head of Questions Presented in the Petition (Questions Presented Nos. 1 to 12 inclusive), the same being hereby assigned as the errors intended to be urged.

SUMMARY OF ARGUMENT.

1(a). The decision of the Supreme Court of California denied to petitioners the fundamental right to self-organize free from employer interference (This right is recognized and guaranteed by Sections 1, 7 and 8 of the National Labor Relations Act); because it authorized the employer to coerce petitioners, at the instigation and coercion of defendant unions, to join defendants' organization against their will.

1(b). This right of the employees not to be interfered with by the employer in self-organization is by necessary inference recognized and guaranteed by the Norris-La Guardia Law. (47 Stats. 70 Sec. 2, 4 sub. (b) (f).) Declaring the public policy of the United States in favor of the right freely to self-organize, it clearly declared the public policy of the United States forbidding the contrary.

1(c). This right to combine for the lawful purpose of collective bargaining has long been recognized, and has not in many years been denied by any Court. It is a fundamental right. It is not given by Section 7 or any other section of the Wagner Act. It existed before that act was passed. The Act simply guarantees the right. The right has been held to be a property right. It is part of the liberty and property of which

the State may not deprive one without due process of law under the due process clause of the XIV Amendment.

2. The allegation that petitioners "United and organized in accordance with the Wagner Labor Relations Act" is all that is necessary to invoke the act's protection. It necessarily alleges that the employment of petitioners brought them within the purview of the Act.

3. The employees may exercise and assert this right to self-organize even though the employer is not engaged in interstate commerce. The Wagner Act applies not only to technical interstate business, but to any business in which strikes and other forms of industrial strife and unrest, having the intent or the necessary effect of burdening or obstructing commerce by materially affecting, restraining or controlling the flow of raw materials or manufactured or processed goods *from* or *into* the channels of commerce. (49 Stats. 449, Section 1, Par. 1, Section 2, subd. (6), (7).) The power of Congress is protective, not merely corrective, and may be, and in the Wagner Act has been, exerted to strike down any threat to interstate commerce inside or out of it.

4. This right of employees to self-organize in an appropriate bargaining unit, free from employer interference, does not depend on certification of their organization as the proper bargaining unit. If the employer freely recognizes the right and the unit is an appropriate one (i. e., not an inappropriate one),

there is no controversy justifying a complaint to the Labor Board, on which alone the Board's jurisdiction to hold an election and certify depends.

5. The Self-Organizing Employees need not embrace all the crafts in an industry or business. The members of any appropriate (not inappropriate) unit may assert the right, and the employer may lawfully deal with them, until the Labor Board says no.

6. "Outside" affiliation is not requisite to the right.

7. If the unit is appropriate and the self-organization is in good faith and free from employer interference, the employees may assert the right to self-organize, before adopting a constitution, by-laws, pledges or rules, and need not have such to assert the right.

8. When employees assert and avail themselves of their right to self-organize, the burden of "negativing" all "unity of interest" between self-organizing employees and their employer lies on those who oppose, not those who assert the right. To hold the contrary is to embarrass and impede the right.

9. Judicial action in the disposition of an appeal, purporting to find and recite, on no evidence, that self-organized employees have no constitution, by-laws, pledges or rules, and that there is an apparent unity of interest between self-organized employees and their employer, deprives such employees of liberty and property without due process of law under the XIV Amendment.

10. The decision by the Court of last resort of the state, construing Section 921 of the California Labor Code, to authorize an employer to coerce members of an inside labor organization and other employees to join an outside labor organization, at the demand of the latter, while denying such authority to the employer at the demand of an inside labor organization, denies the members of the inside organization the equal protection of the laws.

ARGUMENT.

I(A). THE DECISION OF THE CALIFORNIA SUPREME COURT DEPRIVES PETITIONERS OF THE FUNDAMENTAL RIGHT TO SELF-ORGANIZE WITHOUT LET OR HINDRANCE OF THEIR EMPLOYERS, AGAINST THE GUARANTY OF THE WAGNER ACT AND THE DUE PROCESS CLAUSE OF THE XIV AMENDMENT.

(a) The right of employees to associate themselves together for the purpose of bargaining collectively, is a fundamental right.

In *Coppage v. Kansas,* 236 U.S. 1, 19, Pitney, J. says:

> "Of course we do not intend to say, nor to intimate, anything inconsistent with *the right of individuals to join labor unions,* nor do we question the legitimacy of such organizations so long as they conform to the laws of the land as others are required to do. *Conceding the full right of the individual to join the union, etc.*"

In *American Foundries v. Tri-City Council,* 257 U.S. 184, 209, Taft, C. J. said:

> "The right to combine for such a lawful purpose has in many years not been denied by any Court."

In *T. & N. O. Ry. Co. v. Ry. Clks.,* 281 U.S. 548, 570, Hughes, C. J. said:

> "It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay, and conditions of work. (Citing the Tri-City case, supra.) Congress was not required to ignore this right of the employees, but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. * * * Thus, the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional rights of either, was based on the recognition of the rights of both."

In *Labor Board v. Jones & Laughlin,* 301 U.S. 1, 33, Hughes, C. J. said:

> "That (the right of employees to self-organize and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer) is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its own business and

select its own officers and agents. Discrimination and coercion to prevent the free exercise of the rights of employees to self organization and representation is a proper subject of condemnation by competent legislative authority."

In *Amalgamated Workers v. Edison Co.*, 309 U.S. 261, 263-4, Hughes, C. J. said:

"Neither this provision (Wagner Act, 49 Stat. 449, Section 7) nor any other provision of the Act, can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In Nat'l Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33, 34, we observed that this right is a fundamental one; that employees 'have as clear a right to organize and select their representatives for lawful purpose' as the employer has 'to organize its business and select its own officers and agents'; that discrimination and coercion 'to prevent the free exercise of the right of employees to self organization and representation' was a proper subject for condemnation by competent legislative authority. We noted that 'long ago' we had stated the reason for labor organizations,—that through united action employees might have 'opportunities to deal on an equality with their employer'; referring to what we had said in Amer. Steel Foundries v. Tri-Cities Central Council, 257 U.S. 184, 209. And in recognition of this right, we concluded that Congress should safeguard it in the interest of interstate commerce and seek to make appropriate collective action an 'instrument of peace rather than of strife'. To that end

Congress enacted the National Labor Relations Act."

(b) Congress has repeatedly recognized and guaranteed this right.

Congress recognized this right in Subd. 3 of Section 2 of the Railway Labor Act. (44 Stats. 577)

I(B) THE NORRIS-LA GUARDIA LAW GUARANTEES THE EMPLOYEES RIGHT OF FREE SELF-ORGANIZATION.

It recognized this right in the Norris-La Guardia Law. (47 Stats. 70 Section 2) Though that is a mere declaration of policy for the construction of that law, it has necessary implications. It forbids contractual arrangements to the contrary. As the California Supreme Court pointed out in the present case, in construing the identical language of Section 923 of the California Labor Code (see Appendix), "this necessarily means that employee organizations are unlawful when they are formed, subservient to the employer's will, chiefly in order to forestall the unionization of his plant by independent labor unions." (R. 40)

In *T. & N. O. R. Co. v. Ry. Clks.,* 281 U.S. 548, 368, Hughes, C. J. said:

> "* * * subdivision third of Section 2 of the Rail Labor Act (44 Stat. 577) providing that 'representatives for the purpose of this act shall be designated by the respective parties * * * without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives of the other'" [is]

> "* * * a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation," [and] "cannot be disregarded".

Finally, Congress fully recognized the right and provided a speedy means of its vindication. in the Wagner Act. (49 Stats. 453, Sections 1, 7, 8)

In *Labor Board v. Fansteel Metal Corp.,* 306 U.S. 240, 255, Hughes, C. J. said:

> "We think the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. (Citing Labor Board v. Jones & Laughlin, 301 U.S. 1, 33) To assure that protection, the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining. (Citing Assoc. Press v. Labor Board, 301 U.S. 103.)"

(c) California fully recognized the right.

California recognized this right in Sections 920 to 923 of the Labor Code of California. (Cal. Stats. 1937. Ch. 90. See Appendix)

The right of employees to self-organize guaranteed by the Wagner Act, the Norris-La Guardia Law, and the Due Process Clause of the XIV Amendment includes the right of selecting the form of their organization, whether an "outside" union, or an "inside" union, and it has even been held, to remain unorganized.

In *Labor Board v. Sterling Motors Co.* (CCA-9 1940), 109 Fed. (2) 194, 201-2, the Court says:

> "The facts of this case compel the consideration of the dilemma confronting the employees of these smaller independent industrial units. * * * This dilemma for these man and men everywhere in the United States in these smaller plants has three alternative solutions.
>
> "One alternative is to join the great internationals or associations. These give added power often to correct abuses which otherwise could not be remedied. However, they may have a remote control by men, sometimes with power almost autocratic but unfamiliar with the particular small plant problems. They collect larger dues, often to support general sympathetic strikes with which the employees of the independent plant may have no sympathy, and sometimes to be spent in aid of office seekers to whom they are opposed. Into these larger associations the small plant employees are sometimes forced by outside picketing and sometimes by actual violence. When so forced their collective bargaining agent may be designated by methods as remote from 'their own choosing' as where the employer influences or dominates their choice.
>
> "Another alternative is the so-called 'inside union'. While this is exposed to possible employer domination by the very intimacy of the small plant activities, where properly organized it has 'the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee' recognized and approved by the Supreme Court.

Texas & N. O. R. Co. v. Railway & S. S. Clerks, 281 U.S. 548, 568, 50 S. Ct. 427, 433, 74 L. Ed. 1034. In these normal relations the employees often learn whether the plant is prosperous or is running at such a loss that any increase in the wage factor of the cost sheet makes certain the shut-down of the plant entirely or in the department showing the larger red ink figures. That is to say, the employees know what pressure for their betterment will and what will not cause the loss of employment of all or of some of them. Obviously such a small union may be far more advantageous to its members than one under the remote control of policy makers thousands of miles away.

"The third alternative for the small plant seems almost ignored in the titanic struggle for power of nation-wide internationals and associations, though the right to choose it is as worthy of the consideration of courts and legislatures as either of the other two. That is the right not to join or create or assist any labor organization at all, but to deal individually with the employer. What we have described above regarding the result of 'normal relations and innocent communications' between employers and employees properly may lead the latter to choose to remain unorganized. The Supreme Court construes a predecessive statute for the protection of collective bargaining as not prohibiting the employer's 'entering into such contract of employment as it chooses, with its individual employees,' Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 557, 57 S. Ct. 592, 604, 81 L. Ed. 789, and puts a like construction upon the Na-

tional Labor Relations Act, National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352. In a proceeding seeking to destroy a labor organization, we do not interpret the intent of Congress in enacting the Labor Board legislation to have established any presumption that employees are always to be deemed to be aiding a violation of the Act if they prefer no organization and decline to create one.

"Each of these three rights is of equal value and in administering the National Labor Relations Act is entitled to the protection of the Board."

(d) The right has been held a property right.

This right freely to self-organize has been held to be a property right sufficient to support injunctive relief under Section 20 of the Clayton Act. (38 Stats. 738 Section 20; 29 U.S.C.A. Section 52)

In *T. & N. O. R. Co. v. Ry. Clks.,* 281 U.S. 548, 571, Hughes, C J. said:

"* * * if it could be said that it was necessary in the present instance to show a property interest in the employees in order to justify the court in granting an injunction, we are of the opinion that there was such an interest, with respect to the selection of representatives to confer with the employer in relation to contracts of service, as satisfied the statutory requirement (citing Coppage v. Kansas, 236 U.S. 1, 14, 15)."

In *Virginian Ry. Co. v. System Federation* (CCA-4 1936), 84 F (2d) 641, 644, Parker, Circ. J. said:

"The right to self-organization and representation in the matter of rates of pay, hours of labor, and working conditions is a property right, the loss of which would result in irreparable damages to complainants."

And in the nature of things this is so. All private personal rights, other than political are either personal rights (i. e., rights in respect to one's own person) or property rights (i. e., all rights other than personal rights). And the right to self-organize is just as true a property right as the right to enter a partnership, joint venture, voluntary association, or a corporation.

I(C). **BUT CALL IT LIBERTY OR PROPERTY, A STATE CANNOT DEPRIVE A PERSON OF IT WITHOUT DUE PROCESS OF LAW UNDER THE XIV AMENDMENT.**

Coppage v. Kansas, 236 U.S. 1, 14-15.

(e) Where the right is recognized and declared by statute, and is capable of judicial enforcement, it cannot be disregarded by the courts, and must be judicially enforced.

T. & N. O. Ry. Co. v. Ry. Clks., 281 U.S. 548, 568.

In this case, a prima facie tort is sought to be justified as concert of action in the "business interest" of defendants. But if their purpose to coerce the employer into coercing petitioners into joining their union runs counter to the policy of the Federal law,

or to rights guaranteed thereby, their conduct becomes a conspiracy to coerce the employer to violate the Federal law and to punish and oppress petitioners for exercising a right given by Federal law, under 18 U.S.C.A. Section 51.

(f) The decision of the State Supreme Court declared that California's common law, and the California Labor Code Section 921, 923, authorized an outside Labor Union to coerce the employer to coerce the petitioners, already self-organized under the Wagner Act, into joining the outside Union. Petitioners were already self-organized and had selected representatives of their own choosing under the Wagner Act. The effect of the decision was to override their own self-organization, and authorize the coercion of petitioners into accepting representatives not of petitioners' own choosing, but of defendants' choosing, in whom petitioners had no confidence at all. This was a clear violation of the policy of Congress as declared in both the Norris-La Guardia Law and the Wagner Act, and of the "fundamental" and constitutional right of petitioners.

The Wisconsin Supreme Court recognized this conflict under their "Little Norris-La Guardia Law". In

> *American Furniture Co. v. Brotherhood of Teamsters, etc.* 222 Wis. 338, 268 N.W. 250, 264-5,

Wickhem, J. says:

> "It may well be that if, when negotiations for a closed shop are initiated between an outside labor

> union and an employer, the employees have already exercised, free from their employer's domination, or are in the process of so exercising their right to organize and to select representatives for collective bargaining, the employer may not insist that another or different plan of organization be adopted or that other representatives be chosen. If he may not, then no pressure may be brought to bear upon him by an outside union to compel such action."

That is just exactly what the California Court has authorized here, coercion of the employer to coerce petitioners who already have their own self-organization and bargaining representatives, in whom they have confidence, to join defendants' organization, in which they have none.

IIA. THE RIGHT CLAIMED BY PETITIONERS WAS ADEQUATELY INVOKED.

Petitioners alleged that the employer was engaged in the business of selling and repairing automobiles (R. 2) and they had "united and organized" and appointed a committee to negotiate rates of pay, wages, hours of labor and other conditions of employment with the said company, *in accordance with the terms of the Wagner Labor Relations Act,*" notified the company and the Regional Director of the Labor Board of their action. The company recognized the committee as petitioners' bargaining agent for the sales force. (R. 4)

In view of the all-touching applications of the Wagner Act, and its all-pervasiveness, that necessarily al-

leged that petitioners and their work were subject to the Wagner Act, and adequately notified the courts below that petitioners claimed their rights under the Wagner Act.

> *M. K. & T. Co. v. Wulf,* 226 U.S. 570, 573-4;
> *Seaboard Air Line v. Duvall,* 225 U.S. 477, 482;
> *Grand Trunk v. Lindsay,* 233 U.S. 42, 48.

In *Green Bay Co. v. Patten Co.,* 172 U.S. 58, 67, the Court says:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court."

In *Cissna v. Tennessee,* 246 U.S. 289, 293, the Court says:

> "If the Supreme Court of the State treated Federal questions as necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result that it did reach, it becomes immaterial to consider how they were raised. Mendrich v. Lowenstein, 232 U.S. 236, 243; N. Ca. R. Co. v. Zachary, 232 U.S. 248, 257; Mallinckrodt Works v. St. Louis, 238 U.S. 41, 49."

Here the Court used force to try to avoid deciding the federal question.

The adequacy of the raising of the federal question is itself a federal question.

Carter v. Texas, 177 U.S. 442;
Erie R. Co. v. Purdy, 185 U.S. 442;
Bank v. Anderson, 269 U.S. 341.

IIB. THE AUTOMOBILE BUSINESS IS AN INTERSTATE BUSINESS.

In this case everyone in the case knew and understood that the Howard Company ("Seabiscuit" Howard) was the San Francisco Agent for the Buick Automobile made at Flint, Michigan, that they were in interstate commerce beyond peradventure.

The law of California required a Court to take judicial notice of the way in which business is done.

In *Abbey Co. v. San Mateo County,* 167 Cal. 434, 439, the Court says:

> "The practice (cremation) has become so general and crematories are now so common in many of the larger cities of the United States that the Courts may take judicial notice of the usual method of operation."

Midland Co. v. Rudneck, 188 Cal. 265, 268;
People v. Assoc. Oil Co., 211 Cal. 93;
So. Cal. Co. v. Alberti, 58 Cal. App. 84, 87;
Koepple v. Morrison, 84 Cal. App. 137, 140;
Madigan v. Hale Co., 90 Cal. App. 151, 154;
People v. Crowl, 28 Cal. App. (2d) 299, 305 (that tool kits are usually included when an automobile is sold).

There are no automobile manufactories in California.

This case arose in 1937.

Calif. Code of Civil Procedure, Section 1875, sub. 3, reads:

> "Courts take judicial notice of the following facts:
>
> 3. Public and private official acts of the legislative, *executive* and judicial *departments* of this state and of the United States."

The Biennial Census of Manufacturers of the United States Department of Commerce for 1937, Part II, Table 1, pages 4 to 13, shows the industries of California by cities. There are no automobile factories listed. Under "Motor Vehicle Bodies" will be found a few body building works in the Los Angeles District only.

The report of the United States Commissioner of Internal Revenue for the year ended June 30, 1938, Table 1, page 70, shows no automobile factories in California, and under the head of "Automobile Chassis and Bodies" shows $25,235.58, total manufacturers tax collected in the First District of California (San Francisco) and $119,650.26 total manufacturers tax collected in the Sixth District of California (Los Angeles). Compare this with Michigan $40,285,265.11, Illinois $1,005,795.42, Indiana $1,105,643.46, and Ohio $444,774.79.

The California contribution came from : (1) Auto body building plants; (2) The assembly plants of the Ford and Chevrolet companies which import all their parts from Michigan.

There are no automobile factories in California. Everybody in California knows it. The Supreme Court of California should have judicially known this fact.

The business is done by taking an order for a car, and then causing it to be shipped into California from the state of manufacture.

In *Moore v. Pleasant Constr. Co.* (Ariz. 1937) 72 Pac. (2) 573, the Court says:

> "As we know from common knowledge, such materials (cement, steel, nails, etc., used by construction contractors) are not produced or manufactured in this state, or at most only a small portion of them, but are shipped in from the outside, no tax whatever would be paid, the sale to the contractor not being made in this state."

The refusal of the Court to take judicial notice of the way in which the automobile business is done in California, was a reversal of its former position at a time when it was too late for petitioners to meet it, and brought the case squarely within

Brinkerhof Trust Co. v. Hill, 281 U.S. 673.

III. EMPLOYEES MAY EXERCISE THIS RIGHT TO SELF-ORGANIZE EVEN THOUGH THE EMPLOYER IS NOT ENGAGED IN INTERSTATE COMMERCE.

The Wagner Act, by its terms, applies, not only to what is technically interstate business, but to any business, interstate or local, in which strikes and other forms of industrial strife and unrest, having

the intent or the necessary effect of burdening or obstructing commerce by materially affecting, restraining or controlling the flow of raw materials or manufactured or processed goods *from* or *into* the channels of commerce. (49 Stats. 449, Section 1, par. 1, Section 2, subdivisions (6) and (7)) As this Court has so well pointed out, the power of Congress is protective as well as corrective. It may be, and in the Wagner Act has been, exerted to strike down any threat to interstate commerce, whether from the inside or from the outside.

In *Labor Board v. Fainblatt,* 306 U.S. 601, 604, Stone, J. says:

> "It has been settled by repeated decisions of this Court that an employer may be subject to the National Labor Relations Act although not himself engaged in commerce."

The Court has so perfectly stated the rule that we forbear to quote.

> *Labor Board v. Jones & Laughlin,* 301 U.S. 1, 34-49;
> *Edison Co. v. Labor Board,* 305 U.S. 197, 222;
> *Labor Board v. Bradford Assn.* 310 U.S. 318, 326; 60 S. Ct. 918, 922.

Rome has spoken. Conflict in the circuits is a squabble among the monks.

The cavalier disposition of the point by the Supreme Court of California in saying that petitioners didn't allege the employer was in interstate commerce was beside the mark.

It is important to note here that the only exceptions in the definition of "employee" in Section 2 (3) of the Wagner Act is the express exclusion therefrom of farm labor, domestic help and employees of a parent or spouse.

IV. THE RIGHT OF EMPLOYEES TO SELF-ORGANIZE IN AN APPROPRIATE BARGAINING UNIT, WITHOUT EMPLOYER INTERFERENCE, DOES NOT DEPEND ON CERTIFICATION OF THEIR ORGANIZATION BY THE LABOR BOARD AS THE PROPER BARGAINING UNIT.

In *T. & N. O. Ry. Co. v. Ry. Clerks,* 181 U.S. 548, 557, it not only did not appear that the Railroad Labor Board had held an election or had certified the plaintiffs as a proper bargaining unit, but it affirmatively appeared they had not.

The terms of the lower Court's contempt order were in effect: that to purge itself of contempt the Railroad Company should completely "disestablish the Association of Clerical Employees", as then constituted, as the recognized representative of its clerical employees, and should reinstate the plaintiff Brotherhood as such representative, until such time as these employees by a secret ballot *taken in accordance with the further direction of the Court,* without employer interference, should choose other representatives. (p. 557)

Note, that the Court devised its own scheme of election and certification.

The California Court thought it could not do that.

Note, too, that the Court would never have made such an order, and would not have had to, if the Railroad Labor Board had held election or certified.

In *Consolidated Edison Co. v. Labor Board,* 305 U.S. 197, 236-7, it appeared that the employer had already entered into bargaining contracts with Brotherhood of Electrical Workers, affiliated with the A. F. of L. recognizing them as exclusive bargaining agents for their own members employed by it, numbering about 80% of the employees in its crafts. There had never been an election or certification, though the Labor Board had ordered the Brotherhood disestablished.

Hughes, C. J. said:

> "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. Nothing that the employers had done deprived them of that right. Nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining. On this point the contracts speak for themselves. They simply constitute the Brotherhood the collective bargaining agency for those employees who

are its members. The Board by its order did not direct an election to ascertain who should represent the employees for collective bargaining. Section 9 (c). Upon this record, there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to 'affect commerce' in the sense of the Act so as to justify their abrogation by the Board. The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period."

In *Labor Board v. Sterling Electric Motors* (CCA-9 1940) 109 Fed. (2) 194, there had been no election or certification, but the Court annulled a disestablishment order against the employees' inside union.

In *Ballston, etc. Co. v. Labor Board* (CCA-2 1938 98 Fed. (2) 758, there was no election or certificatio by the Labor Board, but a cease and desist orde forbidding the employer to recognize the inside unio was set aside. The Court says (p. 762, col. 1):

> "A union limited to the employees of a sing employer is as legal as any other."

The employer freely recognized petitioners' action in self-organizing and selecting representatives their own choosing, just as the employer did in th *Consolidated Edison* case, supra, the *Sterling Moto* case, supra, the *Ballston Co.* case, supra.

Under these circumstances, an election and cert fication by the Labor Board is impossible. The boar has no jurisdiction to move in on a consenting em ployer and order an election for the purpose of ce tification. Its jurisdiction to do so depends on a com plaint by injured employees or would-be employee against the employer for denial of the right.

Labor Board v. Columbian Co., 306 U.S. 29

In *Labor Board v. Piqua Co.* (CCA-6 1940) 10 Fed. (2) 552, 556, the Court says:

> "The Act assumed the existence of a quasi or con structive contract whereby a legal obligation wa imposed on the employer, even against his inten tion, to deal with an appropriate unit of his em ployees through their chosen representative con cerning the matters referred to in the statute an the Board is without jurisdiction until the em ployer has violated his obligation and a complain

has been lodged with the Board pursuant to Section 10 c of the Act. The employer acts at its peril in refusing to recognize a duly selected bargaining agency of an appropriate unit of his employees, unless the facts show that in the exercise of reasonable judgment he lacked knowledge of the appropriateness of the unit or the selection of the majority representative."

See also *Labor Board v. Griswold Co.* (CCA-3 1939) 106 Fed. (2) 713, 717-8.

V. **TO AVAIL THEMSELVES OF THIS RIGHT, THE SELF-ORGANIZING EMPLOYEES NEED NOT EMBRACE ALL OF THE EMPLOYEES, NOR ALL OF THE CRAFTS IN THE EMPLOYER'S BUSINESS.**

All of the sales division was an appropriate unit. It was certainly not an inappropriate unit. They may assert the right to bargain collectively for their members until the Labor Board, on proper complaint, orders an election and certifies a different bargaining unit.

Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 236-7 supra (80% of the men);

Labor Board v. Del. Ferry Co. (CCA-3 1937) 90 Fed. (2) 520 (all the marine engineers; deck hands, dock hands, and ship's officers not included. Certiorari denied 302 U.S. 738);

Labor Board v. Remington-Rand, (CCA-2 1937) 94 Fed. (2) 862, 868 (3768 out of 6640 men);

Labor Board v. Hopwood Co. (CCA-2 1938) 98 Fed. (2) 97, 100;

Ballston Co. v. Labor Board, 98 Fed. (2) 758, supra;

Labor Board v. Griswold, 106 Fed. (2) 713, 718 (330 out of 370 men);

Labor Board v. Piqua Co., 109 Fed. (2) 552, 556, supra;

Labor Board v. Sterling Motors, 109 Fed. (2) 194, supra (49 out of 70 men).

It was the employer's duty, under the Wagner Act, to treat with petitioners.

In *Donnelly Co. v. Internat. Garment Workers Union* (CCA-8 1938) 99 Fed. (2) 309, 316 (certiorari denied 305 U. S. 662) the Court says:

> "The National Labor Relations Act expressly imposed the duty upon the plaintiff to bargain collectively only with the chosen representatives of their employees, and the implied duty not to bargain with anyone else on their behalf. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44, 57 S. Ct. 615, 627, 81 L. Ed. 893, 108 A.L.R. 1352. * * * It would seem that after receiving notice on March 2, 1937, of the refusal of their employees to accept defendant union as their representative for collective bargaining, the plaintiff (employer) could not reasonably have been expected to bargain collectively with that union with respect to either terms or conditions of employment or with respect to employee representation."

It was petitioners' right, under the Wagner Act, to have their employer treat with them. That duty the employer performed. That right the employer granted. The defendants' picket was a combination to prevent performance of that duty, and to deprive petitioners of that right.

VI. NOR NEED THE SELF-ORGANIZING EMPLOYEES HAVE OR SEEK OUTSIDE AFFILIATION BEFORE THEY CAN EXERCISE THEIR FEDERAL RIGHT.

The freedom of the individual worker to decline to associate with his fellows or with an "outside" union is just as much the concern of Congress as the right of his fellows to organize. In declaring the public policy of the United States in the Norris-La Guardia Law, 47 Stats. 70, Section 2 (Title 29 U.S.C.A. Section 102), Congress says:

> "* * * though he should be free to decline to associate with his fellows, * * *."

In *Labor Board v. Link-Belt Co.* (Jan. 6, 1941) 61 Sup. Ct. 358, 360-1, Douglas, J. says:

> "An 'inside' union, as well as an 'outside' union, may be the product of the right of the employees to self-organization and to collective bargaining 'through representatives of their own choosing' guaranteed by § 7 of the Act."

In *Labor Board v. Sterling Motors,* supra, 109 Fed. (2) 194, 203, the Court says:

> "We hold there is no merit in this contention of the Board, which, in its effect, is that Congress,

> in enacting in[to] Section 7 of the Act the right of employees either to 'self-organization', or to 'join' a union of their choice, intended a different criterion in the consideration of the action of this employer toward 'self-organized' inside associations from that toward an international such as the Brotherhood seeking to have the employees 'join' one of its units."

In *Ballston Co. v. Labor Board,* 98 Fed. (2) 758, at 762, supra, the Court says:

> "A union limited to the employees of a single employer is as legal as any other."
>
> *Labor Board v. Lion Shoe Co.* (CCA-1 1938) 97 Fed. (2) 448, 457;
>
> *Labor Board v. Hopwood Co.* (CCA-4 1938) 98 Fed. (2) 97;
>
> *Donnelly Garment Co. v. Garment Workers Union* (C.D. Mo. 1937) 21 Fed. Supp. 807, 809;
>
> *Donnelly Co. v. Garment Workers Union* (CCA-8 1938) 99 Fed. (2) 309, 316-7.

Nothing in the Wagner Act authorizes an employer to coerce his employees in aid to a union having "affiliation with any external labor organization," as the California Court seemed to think (100 C.D. 359). He is not privileged to pressure his men to join an outside union with national affiliations.

> *International Assn. v. Labor Board* (1940) 61 S. Ct. 83;
>
> *Labor Board v. Fansteel M. Corp.* (6th Point) 306 U.S. 240, 261-2.

VII. IF THE UNIT IS APPROPRIATE AND THE SELF-ORGANIZATION HAS BEEN IN GOOD FAITH AND FREE FROM EMPLOYER INTERFERENCE, THE EMPLOYEES MAY ASSERT THEIR RIGHT TO SELF-ORGANIZE, BEFORE ADOPTING A CONSTITUTION, BY-LAWS, PLEDGES OR RULES. THE CALIFORNIA COURT'S SUGGESTION TO THE CONTRARY WAS WHOLLY ERRONEOUS.

To avail themselves of this right, the workers must first meet and organize. This act is a part of the exercise of the right.

If this is not so, how can the men ever get started?

This point was raised in *Labor Board v. Sterling Motors,* supra. There it appeared that 49 out of 60-70 workers in the plant organized simply by all signing an informal organization agreement.

The Court said (109 Fed. (2) 194, 202):

> "We hold that the self-organization evidenced in the document and creation of the committee is such a 'labor organization' as is recognized by Sections 7, 2(4) and 2(5) of the Act. It does not matter that there were no charter or by-laws or dues as in many other unions. Without these, there was self-organization for the purpose of dealing with the employer."

In *Ballston Co. v. Labor Board,* 98 Fed. (2) 758, 761, it appeared the committee had engaged their own attorney to draft the constitution and by-laws, and paid their expenses. But it did not appear that this had been done.

In New York associations may sue in their associate name.

In *Ebbinghausen v. Worth Club,* 4 Abb. N.C. 300, the New York Supreme Court held that such associations may sue, though they have no constitution, by-laws or rules.

To the same effect are:

Ackerman v. Scheutzverein, 60 S.W. (Tex.) 366;

McLaughlin v. Wall, 105 Pac. (Kan.) 33.

But here we did not sue in our associate name. The members sued as such individually.

But this assertion by the Supreme Court of California, assumed as it was on demurrer without any support in the record, that petitioners' organization lacked constitution, by-laws, rules and pledges is in truth directly contrary to the fact, as we could easily have demonstrated if the Court's ruling had not denied us all opportunity to do so.

VIII. TO IMPOSE ON FREELY SELF-ORGANIZING WORKMEN THE BURDEN OF NEGATIVING ALL UNITY OF INTEREST BETWEEN THEMSELVES AND THEIR EMPLOYER, AS THE CALIFORNIA COURT DID, IS TO HINDER, OBSTRUCT AND BURDEN PETITIONERS IN THE ASSERTION OF THEIR FEDERAL RIGHT.

Company domination is an affirmative matter. The burden is on the person asserting it to prove it by "substantial evidence" not conjecture.

Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229, and cases cited;

Labor Board v. Columbian Co., 306 U.S. 292, 300;

Labor Board v. Sterling Electric Motors, 109 Fed. (2) 194, 205 (citing and quoting California Code of Civil Procedure, Section 1963 (19));

Labor Board v. Bell Oil Co. (CCA-5 1938) 98 Fed. (2) 870.

In *Labor Board v. Abell Co.* (CCA-4 1938) 97 Fed. (2) 951, 957, the Court says:

"There is, however, no justification for the position that spontaneous action on the part of the men is so improbable as to warrant the inference that it was inspired by the management. The promotion of the union originated outside the shop and did not spring from the dissatisfaction of the men with their wages and working condition, and the formation of the committee designed to represent the men in place of the union, and its failure to present any grievances in the short interval between its formation in June, and the hearing in September, 1937, (In the present case the formation was in May, 1937, and the picket controversy arose in August of 1937) tend to prove that there were no grievances to present, rather than that the committee was a sham imposed by the management upon the men. The choice between Union and Committee was presented to the men; its free exercise was guaranteed in the 'right to self-organization' and 'to bargain collectively through representatives of their own choosing', conferred by Section 7 of the Act, 29 U.S.C.A. §157; and there is no sufficient evidence in this case of interference or domination on the part of the employer. In this

respect the burden of proof was on the Union, and while the charge was supported only by conjecture and suspicion, it was refuted by positive and direct testimony. The failure of the Board to credit this testimony does not supply the lack of affirmative proof of unfair labor practice on the part of the employer."

Appalachian Power Co. v. Labor Board (CCA-4 1937) 93 Fed. (2) 985, 989.

When a right is given or recognized by Federal law, it is not competent for a State Court to embarrass its exercise by erecting against it presumptions or burdens of proof or allegation, particularly in violation of the Code rules of that State. (Calif. Code of Civil Procedure, Sections 452, 1963 (1), 1963 (19)). (R. 75)

Morrison v. California, 291 U.S. 82;
P. v. Tilken (1939) 34 C.A. (2) 743, 748, 750, 752;
Western Railroad v. Henderson, 279 U.S. 639.

Under the Federal system one sovereign may not so embarrass the operation of the laws of the other.

McCulloch v. Maryland, 4 Wheaton 316;
Sinnott v. Davenport, 22 Howard 227.

In *North Dakota v. Hanson,* 215 U.S. 515, 525, the Court says:

"* * * it is clear that in principle a State may not so exert its police power as to directly hamper or destroy a lawful authority of the Government of the United States."

Compare:

People v. Gates (1870) 43 N.Y. 40;
Moore v. Moore (1872) 47 N.Y. 467.

In this case none of the "congeries of facts" (we, too, studied under Hohfeld) accepted by the Court as indicia of company control were present. It was clearly alleged that *all* the other crafts in the Howard plant were manned by members of unions affiliated with the Labor Council, and therefore could not pass a picket line, and that that circumstance produced the cesser of work and the damage to the employer resulting in defendants' coercion of it to coerce petitioners. The Supreme Court of California called this cesser of work a "strike" (though there was no strike vote and no strike benefits, and "sympathetic strikes" violate the law and the rules of the A. F. L.) and it declared the picket was a "concomitant" of the strike.

The situation thus alleged conclusively negatives any employer "hostility towards an 'outside' union."

Labor Board v. Link Belt Co., 61 Sup. Ct., 358, 361.

IX. THE ACTION OF THE CALIFORNIA SUPREME COURT, IN THE FINAL DISPOSITION OF PETITIONERS' APPEAL, PURPORTING TO FIND AND RECITE, ON NO EVIDENCE, AND NOTHING IN THE RECORD TO SUPPORT IT, THAT PETITIONERS, FREELY SELF-ORGANIZING EMPLOYEES, "HAVE NO CONSTITUTION, BY-LAWS, PLEDGES OR RULES", AND THAT THERE IS AN "APPARENT UNITY OF INTEREST" BETWEEN THEM AND THEIR EMPLOYERS, IS ITSELF A DEPRIVAL OF THEIR LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW WITHIN THE XIV AMENDMENT.

A finding and recital of fact, finally disposing of a litigant's case, based on no evidence at all or on anything in the record, is not due process of law.

Labor Board v. Bell Oil Co. (CCA-5 1938) 98 Fed. (2) 870;

Labor Board v. Columbian Co., 306 U.S. 292;

Yamataya v. Fisher, 189 U.S. 86;

U. S. v. Williams, 200 Fed. (CCA) 538, 541;

U. S. v. Williams, 189 Fed. 915 (affd 206 Fed. (CCA) 460);

U. S. v. Williams, 175 Fed. 274;

Wong Tsich Wye v. Nagle (CCA-9 1929) 33 Fed. (2) 226.

X. THE DECISION OF THE SUPREME COURT OF CALIFORNIA CONSTRUING THE COMMON LAW OF THE STATE AND SECTION 921 OF THE LABOR CODE OF CALIFORNIA, SO AS TO AUTHORIZE AN EMPLOYER TO COERCE MEMBERS OF AN INSIDE LABOR ORGANIZATION AND OTHER EMPLOYEES, TO JOIN AN OUTSIDE UNION AT THE DEMAND OF THE LATTER, WHILE DENYING SUCH AUTHORITY TO THE EMPLOYER AT THE DEMAND OF PETITIONERS' ORGANIZATION DENIES PETITIONERS THE EQUAL PROTECTION OF THE LAWS AGAINST THE PROVISIONS OF THE EQUAL PROTECTION CLAUSE OF THE XIV AMENDMENT.

Section 921 of the California Labor Code reads:

"921. Every promise made after August 21, 1933, between any employee or prospective employee and his employer, prospective employer or any other person is contrary to public policy if either party thereto promises any of the following:

"(a) To join or to remain a member of a labor organization or to join or remain a member of an employer organization.

"(b) Not to join or not to remain a member of a labor organization or of an employer organization.

"(c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization.

"Such promise shall not afford any basis for the granting of legal or equitable relief by any court against a party to such promise, or against any other persons who advise, urge or induce,

without fraud or violence or threat thereof, either party thereto to act in disregard of such promise."

The decision of the California Supreme Court has construed this section as if the word "inside" or "plant" were interpolated before the words "labor organization" in Section 921 (a), or as if the words "without outside affiliation" were interpolated after them, although the same words in subsections (a) and (b) are to be given a latitudinarian construction; thus permitting an employer to exact as a requirement of employment membership in an outside union, at the demand of such outside union, while at the same time not permitting the employer to exact as a requirement of employment membership in petitioners' association.

In other words, defendants were held authorized to picket the employer to compel him to coerce petitioners into joining their union, though the employer is denied authority to exact (or coerce) membership in petitioners' organization as a condition of employment. Defendants may coerce the employer into a violation of the Wagner Act.

International Assn. v. Labor Board, 61 S. Ct. 83.

Granting to defendants this privilege or immunity denies to petitioners the equal protection of the law.

Petitioners may not bargain with their employer for a closed shop as to their organization, but defendants are authorized not only to bargain for but to compel a closed shop for their organization.

Memembership in defendant organizations is a matter of grace. Defendant organizations are the sole judges of their own membership.

Coppage v. Kansas, 236 U.S. 1, 16, 19-20.

Yet these private organizations have been authorized by the state to coerce an employer to coerce his employees to join their unions, while authority is withheld from petitioners to even suggest to the employer that he do the same for petitioners' organization.

By the Court's own construction of Section 923 of the Labor Code, such company aid to an inside organization makes the union itself illegal. (R. 40) But identical company aid to the outside union is privileged.

To this extent the decision of the Supreme Court of California denies petitioners the equal protection of the laws, as the District Court of Appeals pointed out in its opinions. (89 Pac. (2) 426, 431; 90 Pac. (2) 113, 115)

In *Coppage v. Kansas,* 236 U.S. 1, 20, Pitney, J. says:

> "Can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers? We think not;"

By the same token there cannot be one rule of liberty for a labor union with outside affiliations and a

different and more restrictive rule for petitioners and their organization.

This is not private action. It is action authorized by the state. When the state purports to authorize such action by a closed-charter group, the action is state action, just as truly as if it were done by a duly constituted state agency. It is the authorizing that makes it the state action that is leveled on by the amendment.

> *McCabe v. Santa Fe Ry. Co.*, 235 U.S. 151;
> *Nixon v. Condon*, 286 U.S. 73.

Thus the action of the Railroad Company authorized to provide unequal accommodations for black and white passengers in the *McCabe* case, became state action.

And the action of a party executive committee, authorized to exclude negroes from membership in the party, became state action in the *Nixon* case.

Equal protection of the laws requires the employer should not be privileged to coerce his employees for the benefit of either an outside or an inside union.

> *International Assn. v. Labor Board* (1940) 61 Sup. Ct. 83.

Concededly he ought not to be privileged to coerce his employees into joining petitioners' organization, under the Wagner Act or the Norris-La Guardia Law, nor under Sections 921 and 923 of the California Labor Code, at petitioners' request or otherwise. Neither should he be privileged to coerce his em-

ployees into joining defendants' union, on their demand, or on his own initiative. To so privilege his coercion for defendants' benefit, while forbidding it for petitioners' benefit, denies petitioners equal protection.

> "It does not prescribe a rule and conditions for the regulation of the use of property (petitioners' right of self organization without employer interference) * * * to which all similarly situated may conform", but leaves petitioners "tenants at will under (defendants) * * * of their means of living." (Yick Wo vs. Hopkins, 118 U.S. 356, 368)
>
> "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." (Id. p. 370)

This result of the decision was a new and surprising one.

CONCLUSION.

It is petitioners' contention that the right of workers to self-organize without employer interference is a fundamental right, a constitutional right, part and parcel of the liberty and property protected from state interference by the due process clause of the XIV Amendment; that when the state, by law or the construction thereof, seeks to authorize the employer to coerce his workers into joining any particular union, outside or inside, at the demand of such union, state action has deprived the workers of liberty and property without due process of law.

That whether the right is a constitutional right or not, the right has been guaranteed by Federal law, expressly by the Wagner Act, and by necessary implication by the Norris-La Guardia Law.

It has been guaranteed by the law of California under Section 921, 922 and 923 of the California Labor Code. (See Appendix)

The construction of those sections by the California Supreme Court has deprived petitioners of that right, fully and properly invoked by petitioners.

Briefly, the Court has held that although the employer may not coerce the petitioners himself, yet defendant unions may coerce him to do so, that defendants may lawfully coerce petitioners' employer to violate his duty under the Wagner Act and the Norris-La Guardia Law. The employer must violate Section 8 (2) of the Wagner Act, or suffer destruction of his business.

The Court has denied petitioners their Federal right on wholly untenable grounds.

It has wrongfully held that employees have no right to free self-organization under the Wagner Act, or under the Norris-La Guardia Law or under the Fourteenth Amendment, unless their employer is engaged in interstate commerce, that they have no right to self-organize in an appropriate bargaining unit unless and until certified as such by the Labor Board; that employees cannot freely self-organize in an appropriate bargaining unit if they are only a portion of the employees in the plant; that they may not freely self-organize if they have no constitution, by-laws, rules or pledges; that they may not freely self-organize unless they "negative" affirmatively all "unity of interest" between themselves and their employer, erroneousy erecting a burden of proof and of pleading against petitioners' Federal right.

The Court erroneously and untruly found and recited, on no evidence at all, and on nothing in the record, that petitioners had no constitution, by-laws, etc., and that there was "unity of interest" (whatever that may mean. Doubtless something short of war) between petitioners and their employer, in violation of the due process clause of the Fourteenth Amendment.

Finally, the decision wrongfully purports to authorize the employer, when pressured by an outside union, to foster and aid such union to unionize his plant, in clear violation of the Wagner Act, while at

the same time denying him that privilege at the instance of petitioners or any one else, in violation of the equal protection clause of the Fourteenth Amendment.

For all the foregoing reasons, the Writ should issue and the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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(24)

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 743

JAMES F. McKAY et al.,
Petitioners,

vs.

RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION No. 1067, et al., and HOWARD AUTOMOBILE COMPANY (a corporation),
Respondents.

BRIEF FOR RESPONDENT, RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION NO. 1067, IN OPPOSITION

To Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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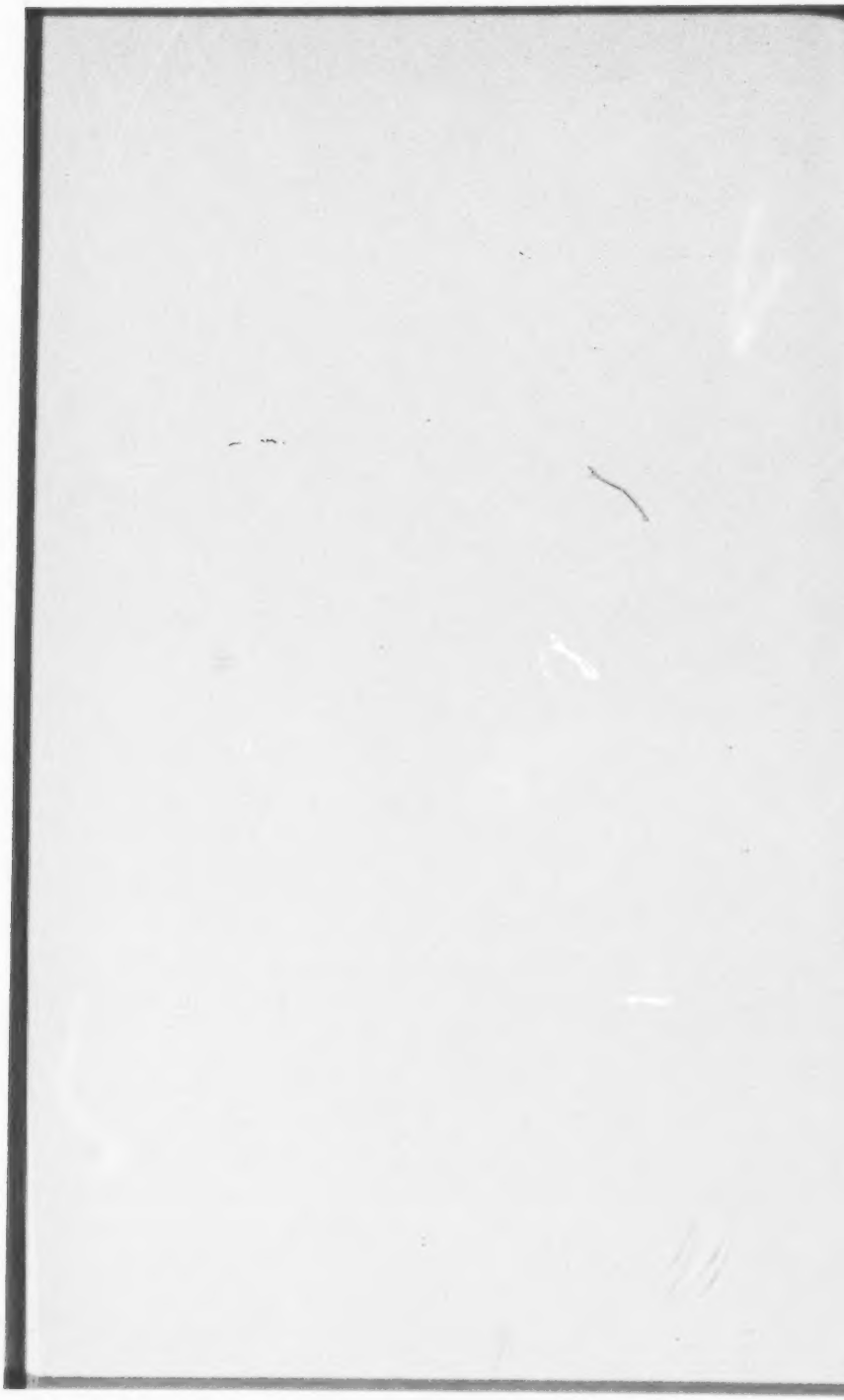

Subject Index

		Page
I.	Opinion of the court below	1
II.	Jurisdiction	2
III.	Corrected statement of the case	3
IV.	Summary of argument	7
V.	Argument	8
	A. The petition for a writ of certiorari should be denied for want of a final judgment	8
	B. The petition for a writ of certiorari should be denied because the sole federal right which petitioners sought to assert, to-wit, an alleged right under the National Labor Relations Act, was neither properly presented nor adjudicated	10
	1. The asserted federal right was not properly presented	10
	2. The asserted federal right was not adjudicated	14
	C. The petition for a writ of certiorari should be denied for want of a substantial federal question	15
	D. The petition for a writ of certiorari should be denied because the judgment of the state court is based upon non-federal grounds adequate to support it	16
	E. Plaintiffs' statement of "questions presented" (petition, p. 9) conclusively demonstrates that the writ of certiorari should be denied	16

Table of Authorities Cited

Pages

American Federation of Labor v. Swing, 309 U. S. 659, 60 S. Ct. 514, 84 L. Ed. 1007 8

American Federation of Labor v. Swing, 61 S. Ct. 568 ..... 9, 15, 18

Atlantic Coast Line R. Co. v. Mims, 242 U. S. 532, 37 S. Ct. 188, 61 L. Ed. 476 11

Brannan v. Harrison, 284 U. S. 579, 52 S. Ct. 28, 76 L. Ed. 502 9

Brinkerkof Trust Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 12

Callahan v. Broderick, 124 Cal. 80, 56 Pac. 782 11

Carlson v. California, 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 15

City of Los Angeles v. Mellus, 59 Cal. 444 14

Dye v. Dye, 11 Cal. 163 11

Fur Workers Union No. 21238 v. Fur Workers Union No. 72, 105 F. (2d) 1 ..... 15, 17

Fur Workers Union No. 21238 v. Fur Workers Union No. 72, 308 U. S. 522, 60 S. Ct. 292, 84 L. Ed. 443 ..... 15, 17

Gant v. Oklahoma, 284 U. S. 594, 52 S. Ct. 203, 76 L. Ed. 512 8

Gant v. Oklahoma, 293 U. S. 98, 53 S. Ct. 30, 77 L. Ed. 1058 9

Lauf v. Shinner, 303 U. S. 323, 58 S. Ct. 578, 82 L. Ed. 872 ..... 15, 16, 17

Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 33 S. Ct. 78, 57 L. Ed. 138 9

Luckehe v. Reclamation Dist. No. 2054, 73 Cal. App. 361, 238 Pac. 760 11

McKay v. Auto Salesmen's Union, 89 Pac. (2d) 426 2

McKay v. Auto Salesmen's Union, 90 Pac. (2d) 113 2

McKay v. Auto Salesmen's Union, 100 Cal. Dec. 347, 106 Pac. (2d) 403 2

Missouri and Kansas Int. Ry. Co. v. Olathe, 222 U. S. 185, 32 S. Ct. 46, 56 L. Ed. 155 9

Moses v. Mobile, 15 Wall. 387, 21 L. Ed. 176 9

Mound W. Co. v. Southern California Edison Co., 184 Cal. 602, 194 Pac. 1014 13

Nevada-California-Oregon Ry. v. Burris, 244 U. S. 103, 37 S. Ct. 576, 61 L. Ed. 1019 12

Pages

New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552, 58 S. Ct. 703, 82 L. Ed. 1012 15

Noble v. Provident Irrigation District, 10 Cal. App. (2d) 284, 51 Pac. (2d) 896 11

North Carolina R. Co. v. Story, 268 U. S. 288, 45 S. Ct. 531, 69 L. Ed. 959 10

Postal Telegraph & Cable Co. v. Los Angeles, 164 Cal. 156, 128 Pac. 19 11

Reddell v. Bryan, 24 How. 420, 16 L. Ed. 740 9

Senn v. Tile Layers Protective Union, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 ..... 15, 16, 20, 21

Shafer v. Registered Pharmacists Union Local 1172, 100 Cal. Dec. 391, 106 Pac. 403 2

Smith Metropolitan Market Co. Ltd. v. Lyons, 100 Cal. Dec. 397, 106 Pac. 414 2

Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 15

Twin City Power Co. v. Savannah River Elect. Co., 284 U. S. 74, 52 S. Ct. 17, 76 L. Ed. 499 9

Vandalia R. R. Co. v. Indiana, 207 U. S. 359, 28 S. Ct. 130, 52 L. Ed. 246 11

Wear v. Kansas ex rel. Brewster, 254 U. S. 154, 38 S. Ct. 55, 62 L. Ed. 214 13

William v. Quill, 303 U. S. 621, 58 S. Ct. 650, 82 L. Ed. 1085 8

Codes and Statutes

United States Statutes:

Fourteenth Amendment 18, 20, 21

Norris-LaGuardia Act (47 Stats. 70) 15, 17

National Labor Relations Act 5, 6, 7, 11, 15, 17, 18

Judicial Code, Section 237(b) 2

California Statutes:

California Code of Civil Procedure, Section 426 11

California Labor Code 6, 16, 20, 21

Section 921 20

Texts

2 Freeman on Judgments (5th Edition, Sections 745, 747) 14

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 743

JAMES F. McKAY et al.,
Petitioners,

vs.

RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION No. 1067, et al., and HOWARD AUTOMOBILE COMPANY (a corporation),
Respondents.

BRIEF FOR RESPONDENT, RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION NO. 1067, IN OPPOSITION

To Petition for a Writ of Certiorari to the Supreme Court of the State of California.

I.

OPINION OF THE COURT BELOW.

The opinion of the Superior Court is unreported but appears in the record. (R. 14-22.)

The opinions of the District Court of Appeal of the State of California are reported in 89 Pac. (2d) 426, 90 Pac. (2d) 113 (not yet officially reported) and also appear in the record. (R. 102-122.)

The opinion of the Supreme Court of the State of California is reported in 100 Cal. Dec. 347, 106 Pac. (2d) 373 and is also printed in the record. (R. 25-79.)

The opinions of the Supreme Court in the companion cases of *Shafer v. Registered Pharmacists Union Local 1172* and *Smith Metropolitan Market Co., Ltd. v. Lyons et al.*, are reported in 100 Cal. Dec. 391 and 397 and in 106 Pac. 403 and 414, and are also printed in the record. (R. 79-87 and R. 88-100.)

II.

JURISDICTION.

The date of the judgment of the Supreme Court of the State of California sought to be reviewed was October 14, 1940. (R. 101.) A rehearing was denied by the California Supreme Court on November 9, 1940. (R. 101.)

Petition for writ of certiorari was filed on February 3, 1941, and served on respondent Retail Automobile Salesmen's Local Union No. 1067, on February 4, 1941.

Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, fails to confer jurisdiction because (1) no final judgment has been ren-

dered; (2) the claimed federal right was neither properly presented nor adjudicated; (3) no substantial federal question has been presented; (4) the judgment of the state Court rests upon non-federal grounds adequate to support it.

III.

CORRECTED STATEMENT OF THE CASE.

Pursuant to the provisions of Subdivision 3 of Rule 27, respondent Retail Automobile Salesmen's Union presents the following corrected statement of the case.

Petitioners (hereinafter designated as "plaintiffs") are all the salesmen employed by the Howard Automobile Company, a California corporation, alleged to be "engaged in the business of selling and repairing automobiles in San Francisco and elsewhere". (R. 2.) Employees of the Company, other than salesmen, are members of Auto Painters, Auto Mechanics, Parts Clerks, Garage Employees and Teamsters Unions. (R. 5.) These organizations and the Retail Automobile Salesmen's Local (hereinafter called the Salesmen's Union) are affiliated with the San Francisco Labor Council. (R. 6.)

Upon the refusal of plaintiffs to join the Salesmen's Union all of the employees except the salesmen withdrew their labor and struck the Company. (R. 5-6.) The Salesmen's Union placed a peaceful picket line around the plant. (R. 5-6.) The Labor Council

put the firm on the "We don't patronize" list. (R. 6.) Thereupon plaintiffs commenced an action in the Superior Court of the State of California, against the employer, the Salesmen's Union, the other named unions and the Labor Council, seeking to enjoin the picketing, boycotting and striking of these organizations. (R. 1-7.)

The complaint contained no allegation claiming a title, right, privilege or immunity under the Constitution or any treaty or statute of the United States except the assertion that plaintiffs "united and organized and designated three of their number a committee to negotiate rates of pay, wages, hours of labor and other conditions of employment with the said company in accordance with the terms of the Wagner Labor Relations Act and the said committee forthwith notified said company and defendant Alice M. Rossiter, Regional Director of the National Labor Relations Board, of plaintiffs' said choice of a bargaining representative." (R. 4.)

On the basis of the complaint and ex parte, the Superior Court ordered defendants to show cause why they should not be enjoined as prayed and issued a temporary restraining order, enjoining defendants pending the hearing of the order to show cause. (R. 8-10.)

In return to the order to show cause the Salesmen's Union filed a demurrer and a motion to strike portions of the complaint. (R. 10-14.) The demurrer challenged the complaint both generally on the ground that it failed to state a cause of action and specially

on the ground, among others, that "said complaint is uncertain in that it cannot be ascertained therefrom: (1) whether plaintiffs and/or defendant Howard Automobile Company are engaged in interstate commerce or intrastate commerce or both interstate and intrastate commerce." (R. 11.)

Prior to the hearing of the order to show cause, plaintiffs dismissed the action against defendant Rossiter. (R. 8.)

At the hearing plaintiffs submitted their application for a temporary injunction on the allegations of their complaint. (R. 15.)

The Superior Court ordered that defendants' demurrer be sustained *with leave to plaintiffs to amend within ten days;* that the temporary restraining order be dissolved and that plaintiffs' application for a temporary injunction be denied. (R. 14.)

The Superior Court upheld defendants' right of peaceful picketing in an opinion rendered with its order. (R. 14-22.) To plaintiffs' contention that an injunction should issue because the picketing violated asserted rights under the National Labor Relations Act the Court answered that it was "nowhere alleged in the complaint that defendant Howard Automobile Company is engaged in interstate commerce so as to bring it under the jurisdiction of that statute." (R. 21.)

Plaintiffs did not amend. They did not even attempt to allege the facts which would have properly raised the issue of their asserted rights under the National Labor Relations Act.

Instead, plaintiffs *appealed from the orders dissolving the temporary restraining order and denying their application for a temporary injunction.* (R. 23.)

The intermediate Appellate Court, the District Court of Appeal, held that the complaint stated a cause of action and that the demurrer should have been overruled. (R. 102-116.)

The California Supreme Court affirmed the orders of the Superior Court (R. 101-102) holding (1) that the complaint charged merely peaceful picketing; (2) that peaceful picketing for a closed union shop was lawful in California under the California Labor Code and (3) that plaintiffs' asserted rights under the National Labor Relations Act did not merit consideration since the allegations of the complaint failed to raise this issue under settled rules of state pleading.

In reply to plaintiffs' contention that because plaintiffs had established their own labor organization any attempt to interfere with their labor relations was unlawful, the Court held that such contention could not be sustained for two equally conclusive reasons: (1) under California law one labor union is not entitled to the protection of equity against lawful competitive activities of a rival union, and (2) plaintiffs' complaint failed sufficiently to show that plaintiffs had organized a bona fide independent labor union. (R. 38-41.) With respect to the latter ground the Court emphasized the need for specific allegations concerning the nature of a claimed labor organization when, as in the present case, plaintiffs

offered the complaint as the only evidence to justify the issuance of temporary injunctive relief in a labor controversy. The Court based this ruling upon the ground that the granting of a temporary injunction in a labor dispute usually terminated the entire matter.

While the Supreme Court affirmed the orders of the trial Court it did not dismiss plaintiffs' complaint.

IV.

SUMMARY OF ARGUMENT.

A. The petition for a writ of certiorari should be denied for want of a final judgment.

B. The petition for a writ of certiorari should be denied because the sole federal right which petitioners sought to assert, to-wit, an alleged right under the National Labor Relations Act, was neither properly presented nor adjudicated.

1. The asserted federal right was not properly presented.

2. The asserted federal right was not adjudicated.

C. The petition for a writ of certiorari should be denied for want of a substantial federal question.

D. The petition for a writ of certiorari should be denied because the judgment of the state Court is based upon non-federal grounds adequate to support it.

E. An analysis of plaintiffs' "Questions Presented" (Petition, p. 9) conclusively demonstrates that the writ of certiorari should be denied.

V.

ARGUMENT.

A. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR WANT OF A FINAL JUDGMENT.

It is axiomatic that a state Supreme Court's denial of temporary relief does not constitute a final judgment in the cause, and therefore certiorari will be denied. In the instant case plaintiffs appealed from orders denying a *temporary* injunction and dissolving a *temporary* restraining order.

In *William v. Quill,* 303 U. S. 621, 58 S. Ct. 650, 82 L. Ed. 1085, this Court dismissed for want of a final judgment an appeal from a state Court's denial of a temporary injunction against concluding a closed shop contract.

This Court, in *American Federation of Labor v. Swing,* 309 U. S. 659, 60 S. Ct. 514, 84 L. Ed. 1007, denied for want of a final judgment its writ of certiorari to review a judgment of a state Court granting a preliminary injunction against picketing in a labor controversy.

In *Gant v. Oklahoma City,* this Court dismissed for want of a final judgment an appeal from an order denying a temporary injunction (284 U. S. 594, 52 S. Ct. 203, 76 L. Ed. 512) and thereafter entertained

an appeal from a subsequent order denying a permanent injunction. (293 U. S. 98, 53 S. Ct. 30, 77 L. Ed. 1058.)

Twin City Power Co. v. Savannah River Elect. Co., 284 U. S. 74, 52 S. Ct. 17, 76 L. Ed. 499, holds that for want of a final judgment an appeal will be dismissed and certiorari denied from a judgment of a state Court refusing a temporary injunction.

To the same effect:

Brannan v. Harrison, 284 U. S. 579, 52 S. Ct. 28, 76 L. Ed. 502;

Reddell v. Bryan, 24 How. 420, 16 L. Ed. 740;

Moses v. Mobile, 15 Wall. 387, 21 L. Ed. 176.

It is immaterial that the state Court's opinion with respect to temporary injunctive relief governs its subsequent action as to permanent relief.

American Federation of Labor v. Swing, 61 S. Ct. 568;

Gant v. Oklahoma City, 293 U. S. 98, 53 S. Ct. 30, 77 L. Ed. 1058.

The form of the judgment rendered by the trial Court has been held to control the question of the finality of such judgment.

Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 33 S. Ct. 78, 57 L. Ed. 138.

This Court in *Missouri and Kansas Int. Ry. Co. v. Olathe,* 222 U. S. 185, 32 S. Ct. 46, 56 L. Ed. 155, dismissed for want of a final judgment a writ of error to review a judgment of the state Court which had

sustained a general demurrer to a complaint but had not dismissed the action.

North Carolina R. Co. v. Story, 268 U. S. 288, 45 S. Ct. 531, 69 L. Ed. 959 (cited in petitioners' petition, p. 5), is not in point for the reason that the question there involved was the refusal of the Court to grant a *permanent* injunction.

B. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SOLE FEDERAL RIGHT WHICH PETITIONERS SOUGHT TO ASSERT, TO-WIT, AN ALLEGED RIGHT UNDER THE NATIONAL LABOR RELATIONS ACT, WAS NEITHER PROPERLY PRESENTED NOR ADJUDICATED.

1. The asserted federal right was not properly presented.

The sole reference to a federal right in plaintiffs' complaint is their allegation that "plaintiffs united and organized and designated three of their number a committee to negotiate rates of pay, and other conditions of employment with the said Company in accordance with the terms of the Wagner Labor Relations Act and the said committee forthwith notified said Company and defendant Alice M. Rossiter, Regional Director of the National Labor Relations Board of plaintiffs' said choice of a bargaining representative." (R. 4.)

The trial Court sustained defendants' demurrer to this allegation on the ground that the complaint did not state facts showing the applicability of the Act and gave plaintiffs ten days within which to amend

their complaint. The California Supreme Court likewise held that the pleading was insufficient to present plaintiffs' asserted rights under the National Labor Relations Act.

This decision followed long established rulings of California law.

A complaint should, of course, state facts and not conclusions of law.

Callahan v. Broderick, 124 Cal. 80, 56 Pac. 782;
C.C.P., Section 426.

An allegation that one has acted in accordance with a statute is a conclusion of law.

Postal Telegraph & Cable Co. v. Los Angeles, 164 Cal. 156, 128 Pac. 19;
Noble v. Provident Irrigation District, 10 Cal. App. (2d) 284, 51 Pac. (2d) 896;
Luckehe v. Reclamation Dist. No. 2054, 73 Cal. App. 361, 238 Pac. 760.

"When a pleader wishes to avail himself of a statutory privilege or right, given by particular facts, he must show the facts." (p. 167.)
Dye v. Dye, 11 Cal. 163.

The decision of the state Court as to the pleading of an asserted federal right binds this Court if it is not rendered in a spirit of evasion to defeat such asserted claim.

Vandalia R.R. Co. v. Indiana, 207 U. S. 359, 28 S. Ct. 130, 52 L. Ed. 246;
Atlantic Coast Line R. Co. v. Mims, 242 U. S. 532, 37 S. Ct. 188, 61 L. Ed. 476;

Nevada-California-Oregon Ry. v. Burris, 244 U. S. 103, 37 S. Ct. 576, 61 L. Ed. 1019.

Plaintiffs cannot successfully contend that the decision here was rendered in a spirit of evasion to defeat the claim of federal right when the Court actually granted them the opportunity to amend.

Nor do plaintiffs improve their position by arguing that the ruling of the California Supreme Court was "shockingly novel"; was not "suggested by either lower court * * *", "came unexpectedly at the end of the proceeding when petitioners had no right to add to the record and supplied a new and unexpected basis for petitioners' claim of denial of federal right." (Petition, pp. 8-9.)

The Superior Court expressly advised plaintiffs that the asserted federal right was not well pleaded. The Court granted plaintiffs "a right to add to the record" to state that contention. That the pleading remained insufficient when plaintiffs presented it to the Supreme Court of California was due to their neglect. In this connection the case of *Brinkerhof Trust Co. v. Hill,* 281 U. S. 673, cited by plaintiffs (Petition, p. 43) does not aid them. There no Court referred to the remedy until the state Supreme Court overruled its previous decision after the expiration of the time during which such remedy was available.

Likewise plaintiffs' contention that the state Supreme Court should have taken judicial notice that the Company was engaged in interstate commerce is unavailing in this Court for a number of reasons.

In the first place judicial notice is a matter which lies exclusively within the judgment of the state Court.

Wear v. Kansas ex rel. Brewster, 254 U. S. 154, 38 S. Ct. 55, 62 L. Ed. 214.

In the second place at no time during the proceedings did plaintiffs even urge any state Court to take judicial notice of the claimed fact that the automobile business was interstate business and that this particular company's business was interstate. Plaintiffs' sole contention in the state Courts was that their pleading sufficiently alleged that the Company was engaged in interstate business. Now that both the trial and state Supreme Courts have ruled that the allegation was demurrable plaintiffs are neither in the correct forum nor at the appropriate stage of the proceedings to urge this argument as to judicial notice.

In fact, even had plaintiffs made the point, it would not have been well taken under California law.

Mound W. Co. v. Southern California Edison Co., 184 Cal. 602, 194 Pac. 1014.

In the third place, a mere statement of plaintiffs' argument on this point demonstrates its unsoundness (Petition pp. 41-43.) Plaintiffs' argument runs (1) the California Court is required to know and analyze every bulletin issued by the Departments of the United States Government; (2) a careful analysis of two particular bulletins might indicate that there were no automobile factories in California; (3) the automobile business must therefore be an interstate business; (4) hence the plaintiffs' employer which is

engaged in automobile selling and repairing business in San Francisco and elsewhere is in interstate commerce. The non-sequitur of this argument is at once apparent.

Finally the additional argument that the Company's business "affects" interstate commerce and hence falls under the Act does not improve plaintiffs' position because even that presently suggested fact was not pleaded.

2. The asserted federal right was not adjudicated.

The state Court has not rendered any decision on the asserted federal right and no decision thereupon was necessarily involved. The state Court only decided that in the face of a special and general demurrer the complaint did not state facts sufficient to plead a federal right.

Plaintiffs do not show that they could not even now obtain leave of the state Courts to amend their complaint in order to plead the federal question. Furthermore, even assuming that the time has expired to amend plaintiffs' complaint in the present action, it is clear that plaintiffs could institute another action in which they could properly allege that claim and in such action the Court would not be precluded by any ruling in this cause from giving full consideration to such right.

City of Los Angeles v. Mellus, 59 Cal. 444;
2 *Freeman on Judgments* (5th Edition, Sections 745, 747).

C. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

1. The questions propounded by plaintiffs have been foreclosed by previous decisions of this Court.

The identical claims now urged by plaintiffs as to federal rights based upon the Norris-LaGuardia Act and the National Labor Relations Act have been heretofore rejected by this Court.

In *Fur Workers Union No. 21238 v. Fur Workers Union No. 72,* 105 F. (2d) 1, the Court of Appeals for the District of Columbia rejected the claim. This Court affirmed in a *per curiam* decision (308 U. S. 522, 60 S. Ct. 292, 84 L. Ed. 443), citing *Lauf v. Shinner & Co.,* 303 U. S. 323, 58 S. Ct. 578, 82 L. Ed. 872; *New Negro Alliance v. Sanitary Grocery Co.,* 303 U. S. 552, 58 S. Ct. 703, 82 L. Ed. 1012 and calling attention to *Senn v. Tile Layers Protective Union,* 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229.

Likewise, in *Lauf v. Shinner,* 303 U. S. 323, 58 S. Ct. 578, 82 L. Ed. 872, this Court rejected the contention.

2. A contrary decision of the California Supreme Court would have denied to defendants their constitutional right of freedom of speech.

American Federation of Labor v. Swing, 61 S. Ct. 568;

Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093;

Carlson v. California, 310 U. S. 106, 60 S. Ct. 736, 84 L. Ed. 1104.

3. The California Courts' application of the term "labor dispute" to any controversy which is reasonably related to employment and to the purposes of collective bargaining is reasonable and hence does not compose a federal question.

Lauf v. Shinner, supra;

Senn v. Tile Layers Protective Union, supra.

D. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE JUDGMENT OF THE STATE COURT IS BASED UPON NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT IT.

The judgment of the California Supreme Court rests upon the following non-federal grounds which are adequate to support it: (1) the procedural ground, to-wit, the construction of plaintiffs' complaint according to state rules of pleading; (2) the substantive ground, to-wit, the ruling that under the California Labor Code affiliated labor unions may engage in a strike and picket a partially unionized employer for the purpose of securing a closed union shop. (R. 92.)

E. AN ANALYSIS OF PLAINTIFFS' "QUESTIONS PRESENTED" (Petition, p. 9) CONCLUSIVELY DEMONSTRATES THAT THE WRIT OF CERTIORARI SHOULD BE DENIED.

In answer to the diffuse petition and brief of petitioners we briefly dispose of the basic "Questions Presented", which plaintiffs frame as their specification of errors and reasons for granting the writ. We will quote and consider each such question seriatim.

Question 1(a). Does not the decision of the California Supreme Court deny to petitioners the fundamental right to self-organize free from employer interference, guaranteed by Sections 7 and 8 of the Wagner Act?

Answer 1. The California Supreme Court has not denied to plaintiffs any right under the National Labor Relations Act. The Court ruled only that it would not consider the asserted right because plaintiffs failed to plead it adequately.

2. Even had the Court considered the asserted right of plaintiffs under the National Labor Relations Act and nevertheless rendered the present decision, it would have denied plaintiffs no constitutional rights and would have been supported by previous adjudications of this Court.

Question 1(b). Is not this right guaranteed by Section 2 of the Norris-LaGuardia Law (47 Stat. 70) by necessary implication?

Answer. No citation of authority is required to support the proposition that the Norris-LaGuardia Act is concerned solely with the jurisdiction of the federal Courts.

Question 1(c). Is not this right part of the liberty and property of which the state cannot deprive a person without due process of law under the XIV Amendment?

Answer 1. This proposition has heretofore been adjudicated by this Court contrary to the asserted right of plaintiffs. (*Lauf v. Shinner,* supra; *Fur Workers Union v. Fur Workers Union,* supra.)

2. A contrary decision of the state Court would have infringed the respondents' constitutional guarantee of freedom of speech. (*American Federation of Labor v. Swing,* supra.)

3. The XIV Amendment is inapplicable because the instant case concerns the conduct of one individual toward another, and the only state action involved is the Court's declaration that such individual conduct does not violate its laws. The mere non-interference of the state in a controversy between its citizens is not such state action as is contemplated by the XIV Amendment.

Question 2. Is the allegation that petitioners "united and organized in accordance with the Wagner Labor Relations Act" a mere legal conclusion?

Answer 1. This question involves the application of state rules of pleading, and the decision of the state Court upon it will not be upset in the absence of a showing that such decision was rendered in a spirit of evasion to defeat the claim of federal right.

2. The asserted rights of plaintiffs under the National Labor Relations Act have been considered in the answer to Question 1(a).

Question 3. Must the employer be shown to be engaged in interstate commerce before the employee can assert or exercise the right to self-organize without employer interference?

Answer. The only relevancy of the question pertains to plaintiffs' asserted right under the National Labor Relations Act, which we have previously considered in the answer to Question 1(a).

Question 4. Does the right of petitioners to self-organize depend on the Labor Board's certification of petitioners' organization as the proper bargaining unit?

Answer. This question has been answered under the previous heading.

Question 5. Must the self-organizing employees embrace all the workers in a plant before they can assert the right to self-organize?

Answer 1. The California Court rendered no such decision as is implied by this question.

2. The part of the decision of the California Supreme Court which dealt with this subject did not concern the asserted federal right of plaintiffs but rather the necessity of specific allegations in a complaint seeking a temporary injunction in a labor dispute where it is contended that the plaintiffs organized a bona fide independent labor union.

Question 6. Must the petitioner have affiliation with an outside labor organization before they can assert the right?

Answer. The answer to this question is the same as the answer to Question 5.

Question 7. Must the petitioners show they have a constitution, by-laws, pledges or rules before they can assert the right?

Answer. The answer to this question is the same as the answer to Question 5.

Question 8. Must petitioners "negative" all "unity of interest" between themselves and their employers to assert the right?

Answer. The answer to this question is the same as the answer to Question 5.

Question 9. Does not the act of the Supreme Court of California in purporting to find and recite, on no evidence at all, that petitioners have no constitution, by-laws, pledges or rules, and that there is an apparent unity of interest between petitioners and their employers, deprive petitioners of liberty and property without due process of law?

Answer. Plaintiffs fail to recognize that the only matter before the California Supreme Court was the interpretation of plaintiffs' complaint, which, the Court held insufficient to sustain injunctive relief on behalf of plaintiffs' "organization" in the absence of specific allegations as to the nature of such organization.

Question 10. Does not the decision of the Supreme Court of California by construction of the unambiguous Section 921 of the California Labor Code to authorize a labor organization with outside affiliations to coerce petitioners' employer into coercing petitioners to join defendants' organization while denying to petitioners' organization the same right, deny to petitioners the equal protection of the law under the XIV Amendment?

Answer 1. The judgment of the California Supreme Court on the construction of a California statute is conclusive. (*Senn v. Tile Layers Protective Union,* supra.)

2. The California Court's construction of the California Labor Code is the same as the Wisconsin

Court's reading of the Wisconsin Labor Code. Such a construction has been held not to violate the XIV Amendment. (*Senn v. Tile Layers Protective Union,* supra.)

3. As stated by this Court in the *Senn* case the issue of equal protection of the law does not arise for the reason that one has no constitutional right to a remedy against lawful conduct of another.

4. Finally, the decision of the California Supreme Court does not deny to petitioners' organization any rights which it grants to respondents' organization. There is not one syllable in the decision which sets up under the California Labor Code different rights for a bona fide company union than for a bona fide non-company union. Both unions under the decision would be equally saved from the interference of a Court of equity by injunctive process.

We therefore respectfully urge that the petition for certiorari is entirely without merit and should be denied.

Dated, San Francisco, California,
April 4, 1941.

JOSEPH C. SHARP,
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MATHEW O. TOBRINER,
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